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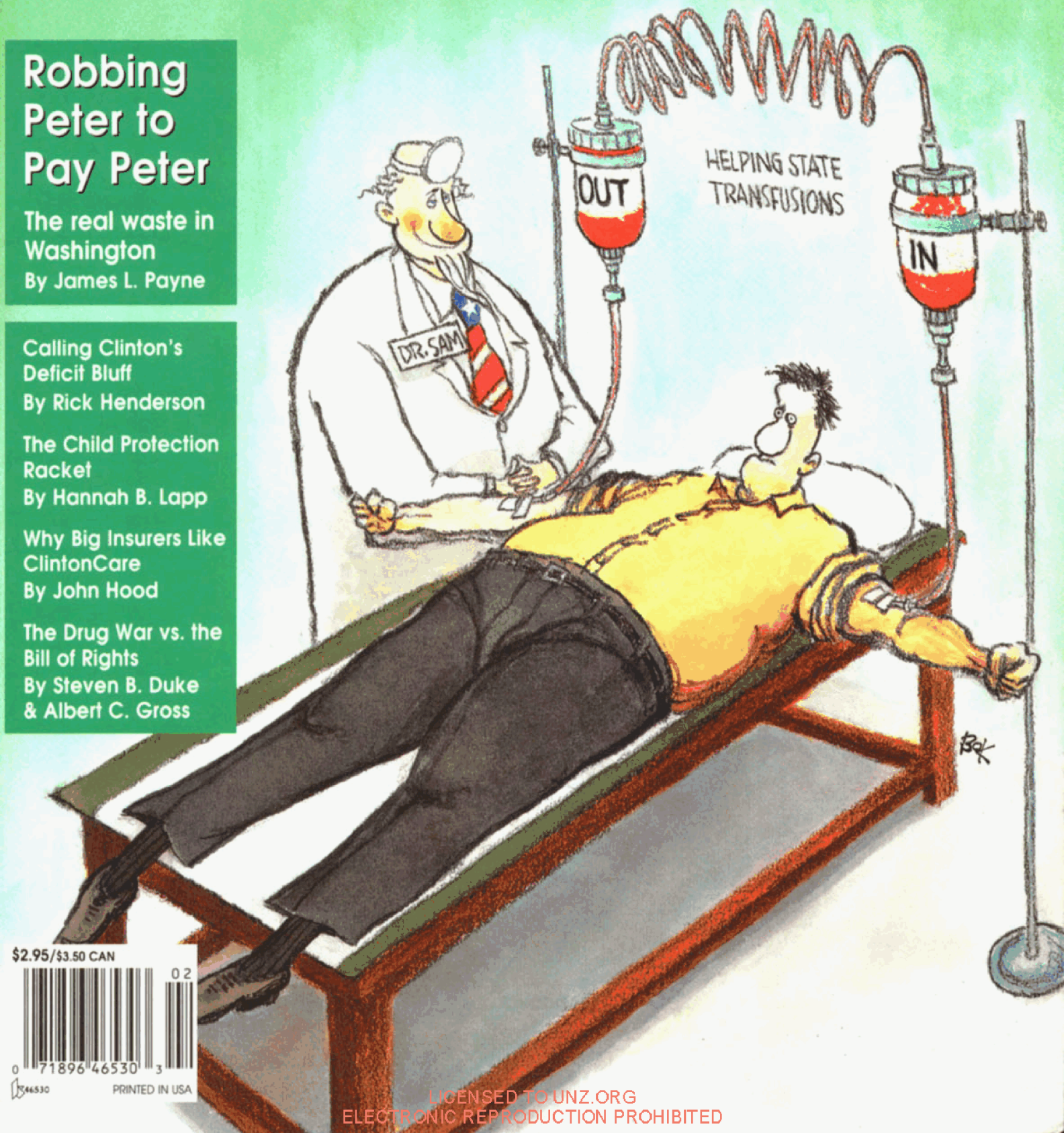

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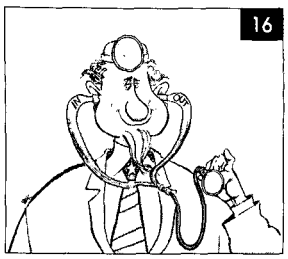

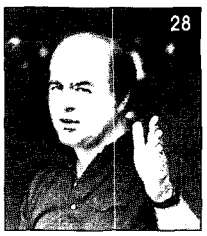

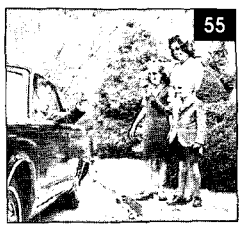

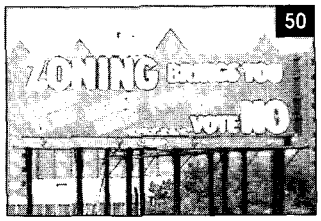

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The Children's Hour

By Virginia I. Postrel

Beware political claims made on behalf of children.

IF 1992 WAS THE YEAR OF THE WOMAN, 1993 was unquestionably the Year of the Child. From every quarter, on every public issue, we heard claims made in the name of children.

Advocates of restricting television violence and of banning guns, of reducing the deficit and of increasing federal spending, of outlawing pornography and of reforming welfare, of beefing up police patrols and of establishing school vouchers, of restoring intolerance toward gays and of curbing sexual harassment—in short, anyone with a political point to make—declared that they spoke on behalf of children, of the family, and of the future.

Children have always had a place in political rhetoric, but this outpouring is new. It's driven in part by events, especially high-profile crimes involving children, in part by the change of administrations—Bill Clinton in the White House means his allies can talk about kids without helping Dan Quayle—and in part by the baby boomers' continuing self-obsession. Boomers who postponed family life until their late 30s or beyond, or who are now on their second families, are the decision makers at many of the magazines, newspapers, and television shows that determine which issues get attention.

The current rage for children in public discourse is understandable. But it is also dangerous. Too many activists are using kids as human shields, to hide adult agendas. Too many boomer parents are foisting their private responsibilities onto the public. And too many people are demanding that we make the adult world conform to the standards of children.

CHILDREN ACT AS A MEGAPHONE, AMPLIfying political claims. If you say you don't like Gay Pride marches, or cigarette advertising, or evangelical Christians passing out tracts on street corners, I may say, "Tough. We live in a pluralistic society based on individual freedom. You have to put up with things you don't like. In return, people who don't like you will put up with you."

If, however, you say you want to protect your children from the things you don't like, your claim is suddenly stronger. You get more sympathy, even from those who oppose your agenda.

That's partly because people respect parents. They understand that raising children is difficult and that even lousy parents invest an enormous amount of hope and pride in their children.

It's also because people who don't have children have at least *been* children. They know that children are vulnerable, and they easily identify with them. They are sympathetic to the claims of innocence. If they had carefree childhoods, they want other kids to have them, too. If they had difficult childhoods, they want other kids to have an easier time.

And, most decisively, claims on behalf of children get a sympathetic hearing because children have a special status in a liberal society. They have neither the full rights nor the full responsibilities of adults. Freedoms can, therefore, be limited for the sake of children.

As a result, everyone who wants to restrict adult liberties has a strong incentive to find a children's angle. The very fact that parents invest so much of themselves in their children leads them to ask the government to support the views they want to instill in their children. If you disapprove of cigarette smoking, for instance, you won't want your children to be tempted by cigarette ads and may ask the government to ban the ads. And if you disapprove of cigarette smoking and couldn't care less about kids, you can attack ads aimed at adults by claiming to act on behalf of children. Regardless of motive, the policy prescription is the same: censorship for kids' sake.

WE SHOULD, THEREFORE, BE WARY when people claim to speak for the good of children—especially when they seek to restrict the freedom of adults. Consider Susan F. Reynolds, M.D., the author of an article in *California Physician* titled "TV Violence: An American Public Health Epidemic." Reynolds spends most of her article recounting the usual scary statistics, survey results, and social-science research. In that regard, her article is quite ordinary.

But its lead is stunning: "Early one evening my son, then 2 years old, became very excited while standing in front of our television set, pointing to the screen saying, 'Man fall down, Mommy, man fall down.' I found myself confronted with the impossible task of explaining to a toddler why the good guy had just shot and killed the bad guy on the police series *Hunter*."

Reynolds is not some teenaged welfare mother. Her child isn't a latchkey kid. She was, in fact, present when her *2-year-old child* was watching a police drama that no 2-year-old could possibly understand, even if it contained not a single shootout. A woman with the intelligence to get through medical school shouldn't need the government to tell her that a cop show isn't fare for toddlers. And a mother who lets her 2-year-old watch such shows isn't likely to heed a warning if one exists.

Now, because Reynolds did not take responsibility for her own child, she wants the government to take responsibility for everyone else's children—and to make sure, by the by, that the shows *adults* can

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watch are also curbed. She is seeking to infantilize the adult world.

WE CAN EXPECT TO SEE MORE SUCH infantilization. When the baby boomers were kids, there was a clear line between the world of children and the world of adults. Kids didn't go to adult parties, didn't call adults by their first names, didn't go to the office when they were off from school, didn't go to adult restaurants or movies. After my parents visited New York City in 1964, I remember telling my mother I'd like to go there sometime, too. She said I'd have to wait until I was older because a lot of places in New York weren't open to children.

All that has changed—even the part about New York City. Beginning December 13, the city's Commission on Human Rights has prohibited any discrimination based on age in public places. So, reports *The New York Times*, the Frick museum, which previously refused admission to children under 10 and required those 10 to 16 to be accompanied by an adult, will have to "let toddlers and teen-agers roam the halls where priceless artworks and furniture...are displayed openly, with barely a velvet rope or restraint." California's sweeping anti-discrimination law a few years ago prevented a theater chain from excluding infants from R-rated movies.

Baby boomers who don't want to bother with babysitters, yet don't want to sacrifice their adult pleasures either, now force their children into adult venues. Indeed, New York City First Deputy Commissioner for Human Rights Rolando T. Acosta was peeved when he wasn't allowed to bring his 17-month-old son into a movie theater.

The stark separation of my childhood was unusual by historical standards and probably less than desirable. (I, for one, think it's good if children occasionally see their parents at work.) But when you start bringing children into the adult world, you run into problems. You can either go back to a premodern model, in which you see children as little adults and don't attempt to shield them from the complexities of adult life. Or you can treat adults as big children, and restrict their rights and responsibilities accordingly. That is, unfortunately, the more popular model in the Year of the Child. ®

A Little Respect

By Jacob Sullum

The surgeon general shows it's OK to talk about drug legalization.

ON DECEMBER 7, AFTER GIVING A speech at the National Press Club, Surgeon General Joycelyn Elders was asked about drug legalization. Her brief response was rambling and barely coherent. But the gist of it was that legalization would reduce crime and should be studied.

The White House slapped down this tentative suggestion almost immediately. Elders was privately rebuked, and the administration unambiguously rejected her call for further research. "Basically, it's not going to happen," presidential spokeswoman Dee Dee Myers said. "The president is firmly against legalizing drugs, and he is not inclined in this case to even study the issue."

Several prominent Republicans condemned Elders. "Americans must be wondering if the surgeon general is hazardous to our health," said Senate Minority Leader Bob Dole. Oklahoma Sen. Don Nickles said Elders should be fired. California Gov. Pete Wilson seconded the motion. "Dr. Elders is willing to relegate the youth of America to the perils of addiction and enslavement," he declared.

"Her proposal is unconscionable and an insult to the courage and determination of every narcotics officer who has instead chosen the hard way and the right way to fight drugs."

Despite all this predictable huffing and puffing, the surgeon general's comments and the response to them suggest that some progress has been made in the public debate about drug policy. For one thing, it would have been unthinkable even a year or two ago for an administration official to flirt with the possibility of legalization. Elders sensed that she could get away with what she said, and ultimately she will. Clinton is not about to follow Nickles's recommendation.

Even more telling was the way the news media treated the Elders story. The coverage was remarkably kind; no one pointed out, for example, that her answer to the legalization question was basically a series of non sequiturs. Some of this gentleness may stem from a reluctance to be hard on a black woman appointed by a Democratic administration. But it was also clear that the press accepts legalization as a genuine issue; the closemindedness of the drug warriors simply will not fly anymore.

Consider the *Los Angeles Times* story on Pete Wilson's attempt to exploit the Elders flap. "In attacking Elders," the *Times* reported, "Wilson exaggerated her position on the issue, suggesting that she advocated legalization when she actually limited her remarks to urging further study of the controversial matter." The *Times* also noted that two members of Wilson's Council of Economic Advisers, Nobel laureate Milton Friedman and former Secretary of State George Schultz, agree that legalization should be considered. And so do "some conservatives such as writer William F. Buckley." (The story might have added that Wilson himself used to support light penalties for marijuana possession, before he decided that all talk of reform was beyond the pale.)

Things have changed considerably since 1988, when Baltimore Mayor Kurt Schmoke called for a national debate on drug-policy reform. Legalization is certainly not popular nowadays, but it is, as George Will put it on *This Week with David Brinkley*, "discussable." That status comes with the perception that respectable people—people like Friedman, Schultz, Buckley, and Schmoke—are in fact discussing it. Their calm, rational arguments have helped bring home the point that the war on drugs is not just unwinnable but enormously counterproductive, that it kills people, undermines their security, takes away their property, and erodes their rights.

All of the panelists on the December 12 Brinkley show took legalization seriously. Will, who called it "a terrible idea," nevertheless said he doesn't think "we ought to raise such a ruckus that people won't expand the range of the discussable in this country." Sam Donaldson, who declared himself "an agnostic" on the question of legalization, noted the futility of trying to keep drugs out of the country by arresting traffickers. Cokie Roberts explained two ways in which prohibition feeds crime: by creating a black market in which rival gangs fight over turf and by filling prisons with drug offenders, forcing the release of predatory criminals. She even acknowledged the existence of "the libertarians in this town," who "are very much for legalizing drugs."

In 1988, when I wrote an op-ed piece advocating legalization for my hometown newspaper, where I was working as a reporter, the editors were so worried about the impression it might create that they attached a disclaimer at the beginning declaring that my opinion was "contrary to that of the paper's editorial board." So far as my father was concerned, I was the only person on earth with such views. But gradually he became aware of the Friedmans and the Buckleys, and today he sees things differently. He doesn't support legalization, but he is willing to talk about it.

This shift has taken place across the country. On radio talk shows, the callers who support prohibition are by now familiar with at least some of the arguments for legalization. For the most part, they have gotten past the mindless bluster ("We can't do that! That would mean surrender in the war on drugs!") and are actually engaging in constructive debate. They often acknowledge, for example, that legalization would reduce the incentive for any given addict to steal, since drug prices would be much lower, but argue that theft would not decline overall because the number of addicts would rise.

Even a die-hard drug warrior like *New York Times* columnist Abe Rosenthal, who has produced some of the most hysterical prohibitionist propaganda in recent years, may have learned a thing or two from the advocates of reform. True, his column in response to the Elders controversy, titled "Surrender on Drugs?," is full of nonsense. (For instance, he trots out the old myth that crime is a direct consequence of drug use.) But Rosenthal nevertheless responds to the arguments for legalization. He even concedes that "legalization might cut the number of drug pushers killing each other or by-standers killed by bullet-spray." Unfortunately, he then adds that "by this logic, armed robbery should be legalized"—which indicates that Rosenthal has not quite grasped the distinction between consensual and nonconsensual crimes. Still, this is progress, of a sort. ®

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Imported Values

"America's Economic Refugees" (Nov.) shows the benefits immigrants bring into this country through their hard work at the grass-roots level, where true entrepreneurship is born as a matter of survival. But I was quoted as if I was underestimating the issue of exploitation. The plight of the immigrant is undeniable, and it is also undeniable that immigrants are exploited in many instances—not only by employers but also by the media, politicians, providers of goods and services, and private as well as governmental institutions.

Immigrants do bring a strong value system to our society. Among Hispanics, the rate of divorce is a lot lower than that of the general population, and the extended family is strong. Eighty-three percent of the Hispanic households in California are the classic family units that serve as a foundation for stability, compared to 64 percent among non-Hispanic whites. Where we fail the immigrants is in not allowing them to maintain a strong sense of identity and self-worth. The present immigrant bashing is an example of denying their value as human beings, and I do not know many people who can fight, much less survive, such reactionary bombardment.

We must provide them with the opportunity of educating themselves, so they can have the freedom to choose which jobs they would like to take. We must allow them to come into the mainstream, so we may benefit from their value system—family cohesiveness, integrity, respect for others, loyalty, love for their kin. We must signal to them that it is OK to be who they are and that they do not have to choose between one culture and another, that there can be a choice of taking what is best from each culture. There is a lot to be learned from them, and in learning from them we can use their value system to return this country to greatness.

José de Jesús Legaspi
Montebello, CA

School Duel

From the viewpoint of libertarians, the school-voucher initiative ("Getting an Education," Nov.) was a fabulous success in one important sense. With the help of a huge number of pro-voucher volunteers, it took only $800,000 to put the initiative on the ballot. But it cost the California Teachers Association, arguably the most anti-taxpayer labor union in the state, $12.6 million to defeat it. All told, 95 percent of the $16.9 million spent against Proposition 174 came from the five government-school labor unions.

Normally the CTA uses its captive dues for advancing new socialist programs and funding big-government candidates. But in this election the CTA was desperately fighting to hold on to its empire—the failing public-school monopoly.

Advocates of limited government should put a voucher initiative on the ballot every year—just to drain the coffers of the CTA and its allied labor unions. Offhand, I can't think of a more cost-effective way to deplete the campaign funding of some of our worst elected officials.

Pat Wright
Chair, Libertarian Party of San Diego
San Diego, CA

Tim Ferguson takes the position that an- other worthwhile concept has fallen on hard times because it wasn't sold right. Is it possible that it wasn't the selling job that was at fault, that the basic concept of vouchers is seriously flawed?

The elitist concept of vouchers is simply one more example of the grand old American tradition of running away from our problems. When the farmland in the East gets worn out, we simply load the family in the wagon and head west, where the land's free and the soil is still fertile.

Universal "free" education is one of the features of our governmental system that sets us apart from the rest of the world as a desirable place to live and grow. A voucher system would be a giant step toward dismantling that system. If we have decided as a nation that we no longer can afford universal, tax-supported education, let's vote it out gracefully. Let's not cop out by picking it to death.

Earl Gates
Decatur, IL

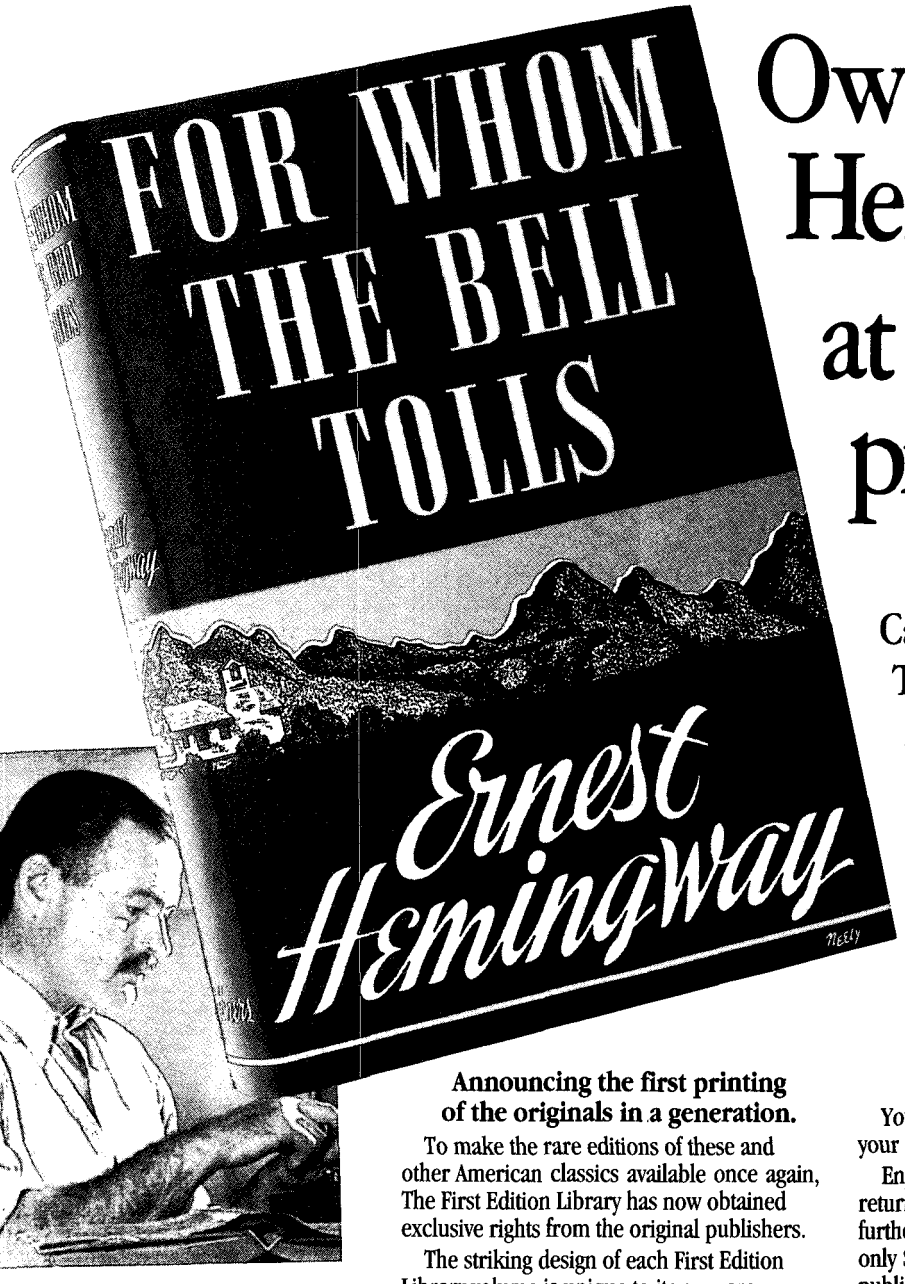
I am appalled and bewildered to find so- called libertarians and conservatives backing another government subsidy in the form of school vouchers and calling it "choice." Sure, all citizens would benefit from a good education, but what about clothing, food, health care? Why don't we ask the government to send us a voucher so we can use it for "choice" in physicians? How about food coupons so we can have "choice" in food? Why not housing chits so we can have a "choice" in neighborhoods? Why don't we just send all our money to the government, and they can send us back a coupon book? That will really increase our choices!

Maggie Kohls
Des Plaines, IL

Common Understanding

Loren Lomasky's review of my *The Spirit* *of Community* (Nov.) suggests that it is not up to my usual social-science standards. He is quite correct, but this is like suggesting that a novel does not rhyme. The book is studded with cartoons and has no footnotes or statistics; it is written to appeal to my fellow citizens and avoids scholastic vocabulary.

Lomasky, though, raises a critical issue that deserves additional discussion whether or not one acknowledges the surprisingly wide appeal of the communitarian message to our fellow citizens. He



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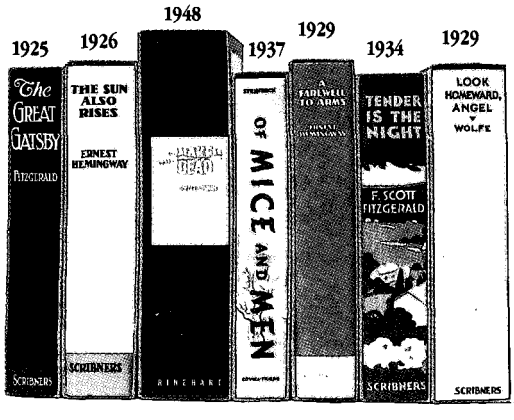

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suggests that the distinction between interests that "are deemed 'public' and those that are merely private" is ill-defined and does not hold up in practice.

Only extreme libertarians would deny the merit of such a category as the common good and put the concept of a public in quotation marks. Others regularly acknowledge that the free market will not attend (or not sufficiently) to some goods —basic research, for instance. Because the yield of basic research is available to one and all, those who heed only private interests will rationally free-ride. Yet it is in the interest of all (as well as of those not yet born) for basic research to take place. A libertarian may well warn against unnecessarily inflating this category, watch carefully that it is not used to impose more commonality than is absolutely necessary, but to deny that there is such a category seems indefensible.

Can we tell in practice what is what? One criterion is who benefits. If the Sierra Club is fighting for untrampled ski slopes for its members, it is acting as a special-interest group. If it is acting to preserve clean drinking water for one and all, it is acting on behalf of the public. Please do not throw out the communitarian baby with the liberal bath water.

Amitai Etzioni
Founder, Communitarian Network
Washington, DC

Another Tax Revolt

Steven Hayward's article on Proposition 13 ("Pushing the Limit," Nov.) dealt well with many of the issues surrounding spending by big government. It gave short shrift, however, to the inequities created by granting continuing tax benefits to old folks like me. Just next door is a fine young family that pays some four times the property tax that I pay for property of similar market value. Even bigger benefits accrue to owners of properties like apartment houses and large businesses that have not changed hands since Prop. 13 passed. This is the basis for still another tax revolt waiting in the wings.

How to fix it? Assess all property at its market value and cut the tax rate to keep revenue steady. Require a two-thirds vote to change the tax rate. Key any automatic increases to the rates of inflation and population change. Finally, as Mr. Hayward ably argues, put a cap on state spending.

George Amberg
El Cerrito, CA

Fetal Position

In "The Killing Grounds" (Nov.), Richard A. Epstein writes: "If a person does not know whether he or she will be in the position of the woman seeking the abortion or the fetus that will be aborted, what rule of decision would that person choose to maximize the welfare of both?" Mr. Epstein assumes that the mother and the fetus are on the same level. A fetus is not a person and should not be given the same rights as a person.

Later on Mr. Epstein asserts that a fetus will become a person without further intervention and assistance of others. In reality, it's not until the 24th week of development that a fetus's lungs develop enough so that it can breathe on its own, without the help of its mother. Premature babies born after exactly 23 weeks have a 10-percent chance of surviving. Premature babies born after exactly 24 weeks have a 50-percent chance of surviving. If an abortion is performed before 24 weeks of a pregnancy, it's legal. Otherwise, the legality is questionable.

Seth Allen
Alexandria, VA

Only people make choices. Fetuses do not, and a non-oppressive government does not deny citizens the right of choice. Abortion, euthanasia, and suicide are very personal choices of the people involved. They only become issues in the minds of those who would manipulate the government to impose their wishes on others.

Milton E. Bennett
Irving, TX

Mr. Epstein replies: Seth Allen and Milton Bennett raise the familiar position that a fetus is not a person and is thus entitled to no weight in any well-ordered political system dedicated to the rights of persons alone. That argument, however, proceeds far too swiftly for its own good, for it does not tell us what the fetus is and what rights and duties, if any, should be attached to the fetal status. If we regarded the fetus as a clump of undifferentiated cells, then abortion would be no more problematic that cutting off a hangnail. Why, then, so heated a debate for a generation? And if the fetus is not just another clump of cells, then it must occupy at the very least some intermediate position between the hangnail and the full person. If so, then it is far from obvious that its interests are always trumped by the claims of a mother whose abortion could be for reasons as serious as protection of her own life or as frivolous as her desire to look good in next summer's swimsuit.

Mr. Allen is wrong to assume that the critical question is when the fetus becomes viable. The question is when its interests start to count, for which the Rawlsian veil-of-ignorance approach is as good as any, since it reminds us all to consider our own vulnerability at the formative stages of our lives. Likewise, Mr. Bennett is wrong to frame the issue as simply one of liberty, given the harm to another living thing, with some, if not all, of the attributes of a person. In sum, both Mr. Allen and Mr. Bennett make a Dworkin-like mistake by assuming that abortion tracks the euthanasia question on all relevant dimensions. Unfortunately, the abortion issue is much tougher and will never be solved by making convenient assumptions about life and living creatures that are false to nature and false to the moral debate.

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Pest Patrol

The Clinton administration's pesticide policy: on balance, a nuisance

By Glen Litsinger

In September, the Clinton administration unveiled its game plan for pesticide regulation. If it's enacted into law, the big winners may be the pests.

In one positive change, the new policy would drop the "Delaney Clause," which bans all carcinogens from processed food. In its place would be a "negligible risk" standard for all foods. This allows pesticides that cause a risk of fewer than one extra case of cancer per million consumers exposed to the substance over a 70-year period.

But the new policy would also:

- Streamline pesticide registration by "sunsetting" pesticide ingredients. For each ingredient in its pesticides, a manufacturer would have to prove every 15 years that toxins meet "negligible risk" standards set by the Environmental Protection Agency. The standards may change at any time, and a product with several ingredients might have a different "sunset" for each ingredient. Currently, manufacturers aren't required to reregister their products for EPA approval unless evidence of harm surfaces.
- Prevent the economic benefits of a pesticide from being considered in the approval process "except in exceptional cases involving significant disruption of the food supply," in which case the product would get a five-year reprieve.
- Make risk standards stricter by basing them on the tolerance levels of children rather than adults.
- Prohibit the export of banned ingredients or products.
- Authorize the EPA to remove pesticides from the market without warning if suspected health problems arise.
- Set national goals to eliminate all "high-risk" (that is, man-made) pesticides and institute "Integrated Pest Management" controls that would require crop rotation, natural predators, and the like by the year 2000.

Secretary of Agriculture Mike Espy says the changes will assure safer food "while maintaining the economic viability of the American farmer."

But as effective pesticides are taken off the market, says Mark Maslyn of the American Farm Bureau Federation, farmers are worried that "this policy will result in higher [produce] prices and lack of product." Maslyn voices other concerns, including the prospect of "citizen suit authority," which lets activists sue private landowners on behalf of the government for alleged violations, and skittish food processors who will "demand foods be pesticide-free if there's even a perception of risk."

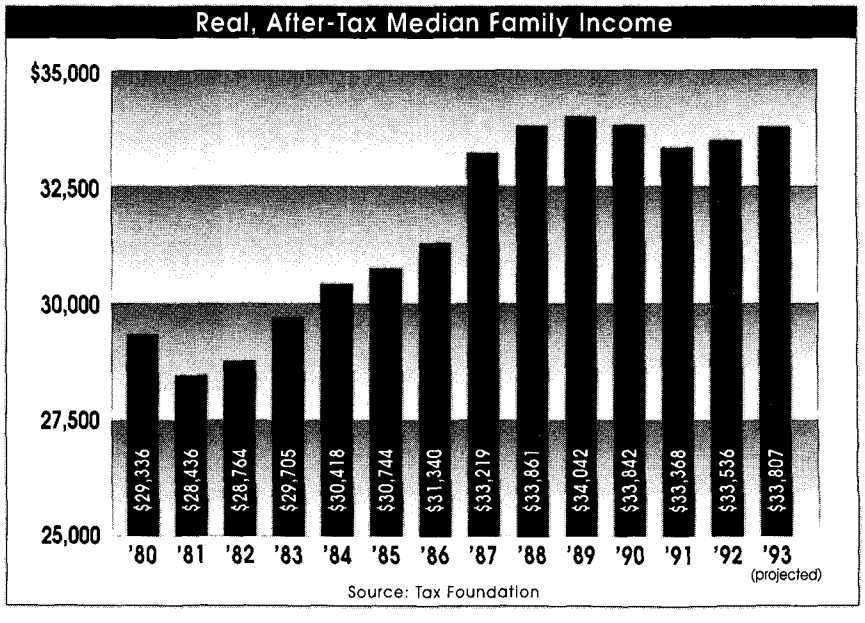
Sen. Edward Kennedy (D-Mass.) and Rep. Henry Waxman (D-Calif.) have sponsored bills that codify the administration's proposed policy. It is also part of the Food Quality Protection Act, introduced in September by Sen. David Pryor (D-Ark.).

The Tax Monster Bites Again

Where the gains of the '80s went

By Rick Henderson

The Clinton administration likes to rail against those Gordon Gekko types who made out like bandits in the 1980s while everyone else fell behind; free-marketeers counter with statistics showing every income group getting wealthier over that time. Indeed, the median family income before taxes has almost doubled, from $26,879 in 1980 to an estimated $51,883 in 1993. So where has the money gone? Inflation and taxes. A study by the Tax Foundation shows that real, after-tax income is only $4,471 higher now than it was in 1980. The big culprits: Social Security payroll taxes, which increased from 12.3 percent of income to 15.3 percent, and state and local taxes, which have risen from 11.4 percent to 12.6 percent. New taxes to finance health-care reform could slice even more from our paychecks.

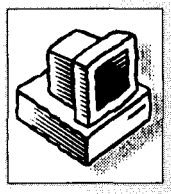


Balance Sheet

By Rick Henderson

Assets

Show Trial. Howard Stern, rest easy: The U.S. Court of Appeals for the D.C. Circuit overturns FCC regulations that prohibit "indecent" broadcasts between 6 a.m. and midnight. The ruling may also stifle congressional attempts to regulate TV violence.



Codebreakers. Congress may loosen the intelligence community's grip on encryption. (See "Hide and Peek," Nov.) Rep. Maria Cantwell (D-Wash.) offers a bill that would lift export restrictions on commercially available encryption software. If the bill passes, domestic software manufacturers say they'll sell an extra $6 billion to $9 billion in encoded programs each year.

Toxic Haste. While dioxin is dangerous, it never was "the most toxic substance known to man." In Seveso, Italy, where a factory explosion released one pound of dioxin into the atmosphere in 1976, a study of residents shows no overall increase in cancer rates. Most notable: None of the residents who were exposed to high levels of dioxin and developed the skin disease chloracne have contracted cancer.

Peace Plan. In case you didn't know the Cold War was over: The CIA and the Pentagon plan to sell nonclassified satellite photographs on the open market. The Russian air force will offer combat training courses to outsiders, including the U.S. Air Force. And German entrepreneur Frank Georgi will open an East German theme park, complete with spartan hotels, surly shopkeepers, and secret police.

Liabilities

Doctoring Figures. Bill Clinton complains that rising health-care costs will bust the budget. So the White House wants to conceal ClintonCare's true costs. It's urgently trying to take the plan "off-budget," so that new health-care taxes and spending won't show up in deficit accounts. Says Health and Human Services Secretary Donna Shalala, "It's not obvious that a [coerced health] premium is a tax."

Exhaust Cost. Cleaner air just got more expensive. Low-sulfur diesel fuel mandated by the Clean Air Act eats away rubber gaskets in automotive fuel injectors. Eventually the gaskets fail, causing fuel leaks. One Maryland resident tells *The Washington Post* it cost $400 to replace the gaskets in his VW Rabbit.

Blocked Grants? Welfare reformers, beware. Old Democrats refuse to be ignored. Eighty-nine House members, including Majority Whip David Bonior (Mich.) and budget chairman Martin Sabo (Minn.), co-author a letter to Bill Clinton. "Real welfare reform," they write, must be "reinforced by substantial financial and human resources." They demand more spending for child care, unemployment insurance, health care, jobs programs, food stamps, etc.

Electric with Fear. The next trial lawyers' bonanza: electromagnetic-field suits. (See "Fear of Phoning," June.) When part of your property is seized for utility construction, rules New York state's highest court, you can seek damages if *fears* of EMF-induced cancer reduce the value of the rest of your land. Trial lawyers say this ruling should apply to any property adjacent to power lines. "Property devaluation cases" will surge, plaintiff's attorney Michael Withey tells *The Wall Street Journal*, "because you don't have to [prove] the science."

Bye, Granny

Nursing homes and subsidies

By Jacob Sullum

DURING THE NEXT THREE DECADES, as the baby boomers move from middle to old age, the ranks of the elderly are expected to swell by 64 percent; the number of Americans 85 and over will nearly double. So the issue of government subsidies for nursing-home care will become increasingly important, just as the clout of benefit-hungry groups like the American Association of Retired Persons reaches an all-time high.

A recent working paper from the National Bureau of Economic Research injects a note of caution into this looming debate. Economists David Cutler of Harvard and Louise Sheiner of the Joint Committee on Taxation note that public subsidies for long-term care tend to reduce assistance from relatives and other private sources. "As the ease of acquiring Medicaid increases or Medicaid payments become more generous," they write, "fewer elderly receive substantial day-to-day help from their children."

Cutler and Sheiner analyze data from interviews conducted in 1982 and 1984 with a random sample of some 6,000 disabled elderly people, about 15 percent of whom spent time in a nursing home during the two-year period. Taking into account financial, demographic, and health information, they compare admissions in states with relatively generous Medicaid policies to admissions in states with lower subsidies and stricter standards. They find that looser rules and lower co-payments lead to greater use of nursing homes among people who may not need them.

"Estimates suggest that all of the elderly admitted to nursing homes when policies change formerly lived with their children or with others," Cutler and Sheiner write. "The view that the marginal nursing home admission is an elderly person living alone and without other means of support does not appear true in our data."

School Switch

Puerto Rico's voucher program

By Rick Henderson

LAST FALL, WHILE EDUCATION REformers focused on California's (unsuccessful) school-voucher initiative, a more radical program began in Puerto Rico. It may serve as a model for public and private school-choice measures nationwide.

On September 3, Puerto Rico's legislature passed the Education and School Choice Program. The plan provides a $1,500 voucher to any student who wants to transfer from a public to a private school. It also gives a $1,500 voucher to a public school for any student who wishes to transfer from one public school to another or from a private to a public school.

To qualify for a private-school voucher, the student's family income must be less than $18,000 a year. Any school that is either licensed or accredited can receive vouchers. (To receive a license, a school simply has to satisfy health-and-safety codes.)

Puerto Rico spends $5,574 per K-12 student. As a percentage of per-capita income, that's four times as much as the U.S. average. Puerto Rico's schools have twice as many teachers per student as those on the mainland, but the graduation rate is only 46 percent.

Although the legislature approved the bill less than two weeks before the school year began, more than 1,800 students signed up for vouchers. Nearly two-thirds of them transferred from one public school to another. Interestingly, 317 students switched from private to public schools, compared with only 311 who went from public to private.

The first $10 million in voucher funding came from privatization of the island's long-distance telephone company. Secretary of Education José Arsenio Torres has said any additional money will come from cuts in the Department of Education's $1.5-billion annual budget.

Both the massive bureaucracy and the atrocious performance of the public schools led to passage of the voucher plan. The local teachers' union (with the assistance of the American Civil Liberties Union) has challenged the plan in court.

The Institute for Justice in Washington, D.C., will represent the parents of students who have received vouchers. Director of Litigation Clint Bolick, who successfully defended low-income voucher recipients in Milwaukee, says, "This is the most important [school-choice] litigation ever." While Bolick expects the commonwealth courts to rule on the case this spring, he says the U.S. Supreme Court may ultimately settle this dispute.

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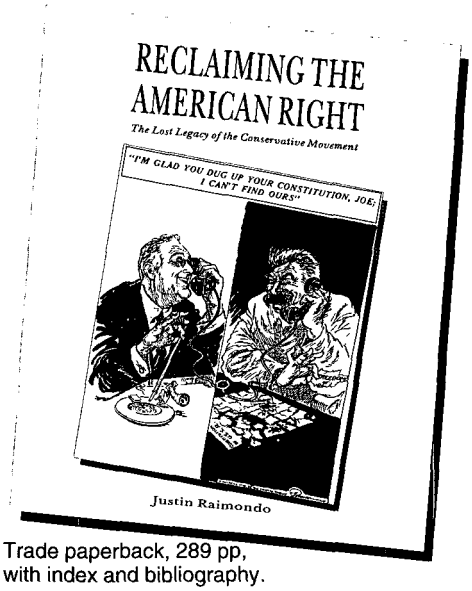
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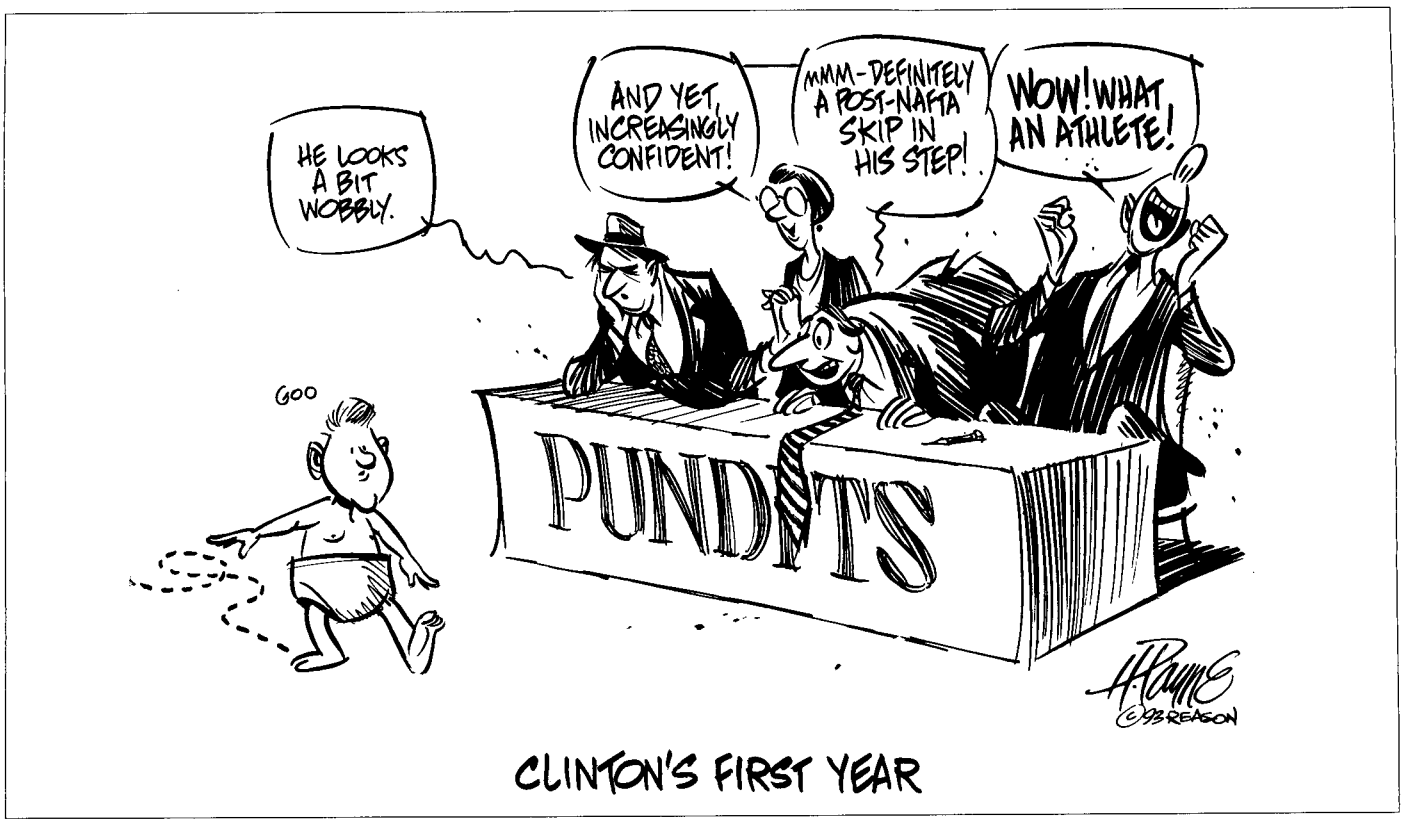
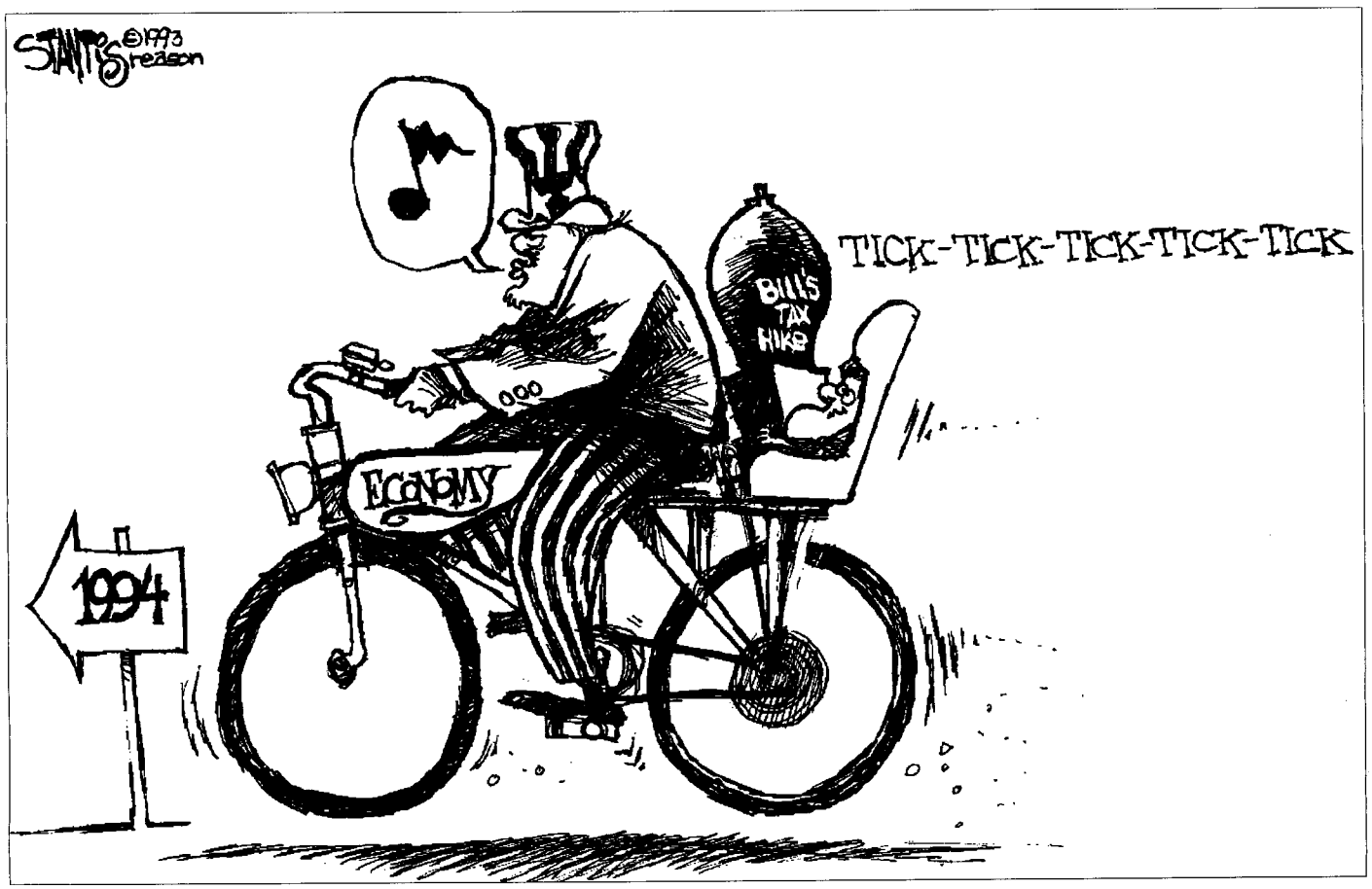


CLINTON'S FIRST YEAR

HENRY PAYNE



SCOTT STANTIS

CHIP BOK

The *Miami Herald* refuses to refer to the city's arena football team by its proper name: the Hooters. Paul Anger, the paper's sports editor, defends the policy, saying that he questions "whether that's an appropriate name for a professional sports team." No word yet on whether the *Herald* considers the Heat or the Hammerheads (two other Miami franchises) "appropriate" names for sports teams.

Utah politicians grappling with campaign reform have made an interesting discovery. Seems that any politician who tithes to his church has violated a 76-year-old state law. The law prohibits candidates from giving to charities or religious groups.

Some friend of the environment Al Gore is. First he redecorates the vice-presidential mansion with a rare wood. Then he has his reinventing government plan printed on glossy, full-color paper. Doesn't he know that plain, unbleached paper is so much easier to recycle?

Lebanon's representative to the Miss World contest is facing possible legal troubles back home. Ghada Turk was photographed fraternizing with Miss Israel. The two countries are still technically at war, so many of Beirut's papers have called for indicting the lovely for treason.

In Connecticut, the Caldor department-store chain refuses to carry radio personality Howard Stern's new book, *Private Parts*. The stores always post the *New York Times* best-seller list, so management faced a quandary when the book hit the top of the list. Rather than tell customers that it didn't stock the best-selling book in the nation, Caldor created its own list, using the *Times* format and logo but omitting Stern's opus. When the *Times* found out about the misrepresentation, it threatened to sue. One wonders if Caldor was inspired by another bestseller: *1984*.

Rapper-actor Tupac Shakur was, within a period of less than three weeks, arrested in separate incidents for allegedly shooting two off-duty police officers and for allegedly holding a woman down while his friend sodomized her. Shakur is a nominee for an NAACP Image award, to be presented in January.

Want to make sure your child never gets an F in school? Enroll him in a school in Houston. The Houston Independent School District has replaced the traditional system of report-card grading with one that shows a child's stage of development in learning things. The stages are discovery, exploration, developing, expanding, connecting, independent application, and synthesis. But irate parents are demanding the old grading system back. I guess they gave this idea a "discovery."

In the Brazilian city of Belo Horizonte, a thief was robbing a shop when he noticed a tank of industrial glue. He took a break to sniff the glue and passed out, knocking over the tank. The next morning the shopkeeper found the man glued to the floor of his store. He called the police, who cut him free and then carted him off to jail.

In 1990, the Bush administration called for the creation of a National Drug Intelligence Center "to consolidate and coordinate all relevant law enforcement information related to drug trafficking and provide a strategic picture of drug smuggling and distribution organizations." But the proposal changed a bit as it made its way through the legislative process. Instead of coordinating information, the new center will duplicate the functions of 19 existing drug-intelligence centers. And instead of setting up shop in the corridors of national power, it is located in Johnstown, Pennsylvania, an economically depressed town of 35,000 best known for its floods. Rep. John V. Murtha, Democrat of Johnstown, explains the location this way: "That's where I wanted it." He adds that the move saves taxpayers money, since rents are lower in Johnstown than in Washington.

The Federal Trade Commission has said it may require stock cars sponsored by tobacco companies and carrying the logos of smokeless tobacco products to carry labels warning about the dangers of chewing or dipping tobacco. One of the proposed warnings is: "This product is not a safe alternative to cigarettes." That should be easy to read on a vehicle traveling at over 100 m.p.h.

—Charles Oliver

Where Have All the Dollars Gone?

★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

How the government robs Peter to pay him back

By James L. Payne

CHIP BOK

On the ground, an overloaded airplane still looks like an airplane. It seems to have all the necessary parts—the wings, the motors, the tail assembly. It looks so much like an airplane that passengers may be easily deceived and embark upon it expecting to travel to faraway places. But to the engineer who reckons such unseen factors as thrust and lift, this machine has no capacity for flight. It is, in its present state, nothing more than a truck, a vehicle that can only motor noisily around the airport grounds.

The modern helping state has become something like this overweight airplane. The politicians have used it to subsidize practically everything that human beings could want, from housing to hospitals, from science to string quartets. The prevailing assumption in welfare-state capitals around the world is that there is always room for one more subsidy.

But a close look into the theory of subsidies shows that this assumption is incorrect. Government cannot successfully subsidize a large number of beneficiaries. This is not a statement of opinion, nor even a declaration of fact. It is a mathematical point. Too many subsidies mean that government cannot help anyone. The passengers climb aboard and the engines make an impressive roar, but the plane goes nowhere.

Although Beltway insiders haven't got it yet, some onlookers are beginning to note the circularity of welfare-state economics. "I love the message coming from both parties," said Ross Perot at the National Press Club during the '92 campaign. "'Can we buy your votes with your money this year?'" Perot may be more sound bite than substance, but even he seems to recognize that there is something absurd about this system.

★ *The Cornucopia Illusion*

Our intellectual roots leave us poorly prepared to analyze the limits to subsidies. The modern Western tradition treats government as a cornucopia, an inexhaustible source of everything that people might need. Government has a bulging treasury of hundreds of billions that it showers in subsidies in every direction.

A closer look reveals, of course, that this appearance of wealth is deceptive. Government does not create wealth. It is simply an agency for coercively shifting it about. The helping state is not a complete economic system; it is merely the attractive face of an equal and opposite "hurting state," a government that day by day inflicts privation upon its citizens, taking their money away from them.

Economists have generally been willing to point this out, to reveal to their students that the standard government subsidy merely represents the robbing of Peter to pay Paul. Unfortunately, they fail to extend the inquiry. They do not ask the critically important question: What happens when we feel sorry for Peter and try to subsidize him, too? What are the economic implications of taxing Peter to pay Paul, and then taxing Paul to pay Peter?

One excuse they will give for not having studied this problem is that it would be illogical to tax and subsidize the same person. But the idea that governments are rational is, unfortunately, little more than an academic fiction. Subjects and sufferers of governments, from the days of Nero to the age of Rostenkowski, know that wise government is, if not an outright myth, at least an historical rarity.

It may indeed be silly for government to subsidize the same people it is taxing, but that is certainly what it is doing today—on a vast scale. It is practically impossible to find someone who is the object of a government helping program who does not also pay taxes: retirees, farmers, scientists, elderly people needing medical care, veterans, the unemployed, college students, the disabled, even the very poor. Some groups may escape the income tax, but they pay a hefty employment tax as well as a multitude of federal, state, and local excise taxes. We are now in the age of self-subsidy: To a considerable degree, each of us is paying for his own government benefits.

Perhaps we have overlooked this problem because it has crept up on us cloaked in a subtly shifting "public goods" theory of government spending. In its original meaning, a public good was a socially beneficial thing that individuals could not purchase for themselves: defense, police, and judicial services; protection of patents and copyrights; and public works of great scale where user charges are infeasible.

Over time, the meaning of "public good" quietly evolved to include *any* socially beneficial expenditure. This shift opened the floodgates to self-subsidy, since practically all personal expenditures have a socially beneficial aspect. If you house yourself, you are preventing homelessness; if you educate yourself you are improving productivity; if you go to the doctor you are improving health. Now it has become full-bore public policy to buy things people can buy for themselves.

The point applies to cultural, charitable, and scientific activities as well. These have benefits that extend to the wider society, but they are not public goods in the strict sense of not being purchasable by individuals. Art, music, literature, scientific research, and charitable projects of all kinds can be—and are—supported privately, both on a profit-making basis and philanthropically. If to fund such activities the government taxes the people who already would support them, then it engages in self-subsidy. The opera-goer who gets a reduced-price ticket because of a subsidy is also a taxpayer who pays for that subsidy.

Consider painter Donald Baechler, who has had 27 solo exhibitions around the world and sells several hundred thousand dollars of art each year. The federal government has decided that he is a valuable contributor to modern culture and wants to make his life and work easier by putting more dollars in his pocket. He was awarded a $15,000 National Endowment for the Arts fellowship in 1989. But at the same time the government makes his life and work harder by taking thousands away from him in taxes. Baechler commented to *The Wall Street Journal*, "I paid about a quarter of my taxes with my NEA grant."

Farm subsidies illustrate the same pattern. Government spends billions to support farmers and bolster their standard of living. In 1982, for example, the federal budget showed outlays of $13.3 billion for "farm income stabilization" (commodity price supports, crop insurance, agricultural credit, etc.). I choose 1982 because that's when the Department of Agriculture happened to do a survey of disposable farm income. It revealed that farmers paid $4.5 billion in various business taxes, $1.3 billion in Social Se-

curity taxes, and $7.6 billion in personal tax payments (such as federal and state income taxes, federal self-employment tax, and property taxes). So by this accounting (which did not include all tax burdens on farmers), government was forcing farm income down by $13.4 billion—almost exactly what it was spending to keep farm income up. Everywhere we look, we find government using its powers of taxation to drain funds away from the same people and functions that government itself has declared worthy, subsidizable social needs.

★ The Illusion of the Frictionless State

Taxing the same people and activities that you subsidize may be pointless, but is there any real harm in it? This was the view of a staff member of the Senate Budget Committee when I tried to interest her in the dilemma. Self-subsidy represents no real problem, she felt, because "it evens out: Everybody pays for everyone else's goods."

This complacency betrays a second illusion about government spending—namely, the idea that the state can transfer resources without any significant cost. If this assumption were true, then self-subsidy would indeed be no problem. If we took from a poor person, say, $1,000 in various taxes and then returned $2,000 to him in various benefits, he would simply be up $1,000. Mathematically, it would be the same as not taxing him at all and giving him a $1,000 subsidy.

But the state is not a frictionless machine. Governmental transfers of resources entail enormous overhead costs, which appear in both the tax system that collects the funds and in the disbursement system that allocates the subsidies. On the taxation side, they include the following:

Tax compliance costs: record keeping, reporting, filling out forms, and learning about tax regulations. A recent Arthur D. Little study found that the total time businesses and individuals spent on federal tax compliance activities was 5.4 billion hours. This translates into 2.9 million people—the entire work force of the state of Indiana—working full-time all year long. The economic cost of this labor amounts to 24 percent of federal tax revenue. (The detailed calculation of this figure, based in part on cost information from the IRS and Arthur O. Andersen, appears in my new book, *Costly Returns: The Burdens of the U.S. Tax System.*)

Tax disincentive costs: the loss of production because of the discouraging effect of taxes on investment and labor. In recent years, a number of economists have made calculations of this "excess burden" for a wide variety of taxes. In a 1985 article in the *American Economic Review*, Michigan State economist Charles Ballard and his colleagues estimate that for each additional dollar in taxes collected the economy loses 33.2 cents of production.

Costs of tax enforcement: resources expended in responding to the tax authority. Each act of tax enforcement—each audit, each notice, each levy—entails a burden for the citizen subject to it. Since these actions run into many millions every year, the time and expense for citizens is significant. Tax avoidance—setting up shelters, using loopholes, litigation—entails further costs. My calculation of the enforcement and avoidance costs comes to 8 percent of tax revenue.

When the overhead costs are added together, (24 percent compliance costs, 33 percent disincentive costs, and 8 percent other costs), they total 65 percent of tax revenue. Although future studies may come up with slightly different numbers, there is no doubt that the overhead costs of taxation are substantial. This means that every act of self-subsidy entails a significant waste. When the government takes a dollar from Peter to give it back to him later, there is a huge loss attached to the transaction.

Unfortunately, the bad news doesn't end there. Peter is never going to see this dollar, even if it is destined for him, because of the waste in the system for disbursing subsidies. These overhead costs include the following:

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Taxing the same people and activities that you subsidize may be pointless, but is there any real harm in it? Yes, there is. The state is not a frictionless machine. Governmental transfers of resources entail enormous overhead costs, which appear in both the tax system that collects the funds and in the disbursement system that allocates the subsidies.

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Administrative costs: the resources expended by government in attempting to give the subsidy to the right people in the right amounts and to control their proper use of it. For example, in the federal food-stamp program, the cost of operating the state and federal bureaucracies that administer the program amounts to 16 percent of total spending. Hence, a recipient who was taxed $1.00 for this program would, at best, get 84 cents worth of food back.

Subsidy compliance costs: the resources expended to get the subsidy. Government benefits don't drop out of the sky. Would-be beneficiaries have to apply for subsidies, which means filling out forms, drafting proposals, and standing in lines. Getting food stamps, for example, requires many days of "work," supplying officials with some 60 pieces of required information.

Misallocation costs: resource loss caused by inefficient purchasing practices. Because government is shielded from the disciplines of the market, it tends to be wasteful. George Mason University economists James T. Bennett and Manuel H. Johnson reviewed a number of public-private comparisons in service delivery (including trash collection, fire protection,

ship repair, airlines, and ambulance service). They found that it costs government twice as much to supply the same service as a private provider—a 50-percent waste factor.

Subsidy disincentive costs: the loss of production caused by undermining incentives to work, save, invest, or innovate. In trying to help people, a subsidy will typically weaken their motivation to help themselves, lowering productive effort. Government payments for disability or retirement, for example, encourage people not to work. So do unemployment payments. Economists Lawrence Katz of Harvard and Bruce Meyer of Northwestern have found that each 10-day extension of unemployment benefits increases the average unemployment spell by two days.

To estimate the average disbursement cost for all government spending programs would be a major undertaking. But it is clear that we are dealing with a very substantial number. Until a more complete study comes along, I am inclined to use the Bennett and Johnson figure—$1.00 of waste for every $1.00 spent. Combined with the overhead costs of the tax system, this means that it costs $1.65 to raise $1.00 for members of Congress to spend on subsidies and overhead, with only 50 cents finally getting to the beneficiary. So Donald Baechler's $15,000 NEA subsidy actually cost more than $45,000; to put $13 billion in farmers' pockets actually costs the country $39 billion.

Nationwide, the cost of the tax and self-subsidy system is staggering. American governments are extracting around $2 trillion from the public and imposing tax-system overhead costs of about another trillion on top of that. This loss is akin to every American family suffering a $48,000 robbery each year. Surely, this tax bite ought to figure as a first explanation of hardship—of the unemployed with no savings, of the working poor who can't make rent payments, or of the elderly who can't afford prescriptions.

Yet whenever a subsidy is under consideration, members of Congress, pressure groups, and journalists stress the neediness of the beneficiaries. If the question is medical care, everyone will insist that it is "impossible" for workers to afford it out of their own resources. But these same workers are subject to taxation. If their budget is so tight they can't afford medical care, how are they expected to spare the thousands of dollars they are forced to pay in taxes? To be consistent, policy makers should agree that if people need money, then government shouldn't be taking it away from them.

☆ A Way Out

A simple rule would save us from the waste and futility of the overloaded helping state: Never tax and subsidize the same thing. Before policy makers try to help some group, they need to make sure they are not first hurting them with their tax programs. Before they tax some interest or activity, they should check to see that they are not already subsidizing it.

This precept seems to have been missing from both popular and academic formulations of political economy. The state has been seen as a mystical something-for-nothing machine which could aid all human aspirations. It has been assumed that funds flow into government hands through some harmless process, and that in spending these tax monies, policy makers somehow multiply their value. In this optimistic view, even self-subsidy represents a kind of plus: The cupcake that government buys for you with your tax money somehow represents a better, fairer cupcake than the one you buy for yourself.

Overcoming this fallacy directly may not be easy in a culture still in the grip of the primitive cornucopia illusion. But indirectly, there is a route to sanity. It's the tax-credit approach: Instead of taxing a person and then trying to give the money back as a subsidy, don't collect the tax and let him use the money for the same purpose as the subsidy. A number of these have been enacted in recent years. The tax-sheltered Individual Retirement Account lets people save for their own old-age pensions, instead of running the funds through the tax-and-spend system for the same purpose. The investment tax credit is another example. More such ideas are on the way. Freshmen Reps. Rod Grams (R-Minn.) and Tim Hutchinson (R-Ark.) are now pushing for a $500 child tax credit, on the sensible grounds that letting parents spend their own money on their children is a more worthwhile child-care program than anything government could ever fund.

There are problems with tax credits, of course. They involve a certain amount of red tape, and if members of Congress refuse to rein in spending as they enact them, they widen the deficit. But even with flaws, they make more sense than digging ourselves deeper into the self-subsidy hole. The widespread practice of using people's own tax monies to buy things they would buy for themselves amounts to a national disaster. We urgently need to undo the intellectual and institutional framework that sustains this folly. ®

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A simple rule would save us from the waste and futility of the overloaded helping state: Never tax and subsidize the same thing. Before policy makers try to help some group, they need to make sure they are not first hurting them with their tax programs. Before they tax some interest or activity, they should check to see that they are not already subsidizing it.

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James L. Payne is director of Lytton Research and Analysis in Sandpoint, Idaho. His latest book is Costly Returns: The Burdens of the U.S. Tax System, *published by ICS Press.*

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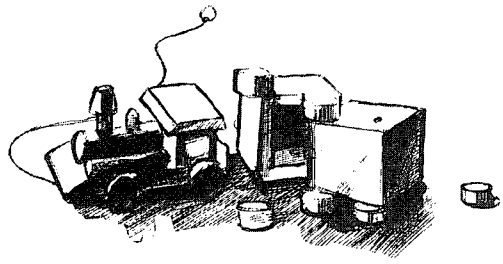
DUCTION PROHIBITED

Casualties of War

Drug prohibition has shot gaping holes in the Bill of Rights.



By Steven B. Duke and Albert C. Gross

At 2 a.m. on June 29, 1991, Tracy White of Los Angeles was awakened by the explosion of a diversionary grenade set off in a trash can outside her front door. She stumbled out into the upstairs hallway and was met by a shaft of light and a man's voice. "Freeze," he said. "Police."

At that moment, her bedroom windows shattered and two men clad in black hoods swung into the room. Her three infants shrieked in fright. Several guns were pointed at her. More men dressed in black bounded through the bathroom window. One ran into an adjoining bedroom and pinned Tracy's sister Yolanda and her 12-year-old daughter behind a door. The youngster tried to squirm free and found the barrel of a pistol against her head. She closed her eyes and urinated on herself. "I thought," she later said, "he was going to kill me."

The police had been searching for White's cousin, a reputed gang member, who did not live there and was not there when the raid occurred. The White apartment was left a shambles. Almost all the windows were gone, crystal glassware was reduced to shards, and a chunk was missing from a couch armrest. Six months after the raid, White and her children still refused to move back into the old apartment, unable to find peace of mind in a place that reminded them of hooded men crashing through their windows.

The injuries inflicted on the Whites were mostly psychological, but some searches are lethal. In Atlanta, in 1991, a pre-Christmas raid by nine cops with guns drawn awakened Bobby Bowman as they broke down his door with a battering ram. Bowman, who says he thought he was being robbed, opened fire with a shotgun. A gunfight ensued, and Bowman's 8-year-old stepson, Xavier, who had been sleeping in the front room, was killed by a detective's bullet. The police found $780 worth of crack in Bowman's apartment.

Teresa Nelson, Georgia director of the American Civil Liberties Union, questioned whether it was worth the life of an innocent 8-year-old to get evidence in a drug case, but Atlanta police defended the tactics, as do police across the country. They claim that surprise and overwhelming force are necessary to minimize destruction of evidence. Many also make the debatable claim that violent attacks reduce the danger to the police from counterattacks.

Such raids and ransackings are standard procedure in most large cities and, except in the most outrageous cases, they receive the approval of courts. Police can get search warrants on the flimsiest of suspicion—even the word of an anonymous informant. In many cases, though, the police don't even bother to get a warrant, since they are virtually unfettered by the risk of successful suits or other sanctions, especially if they confine their warrantless invasions to poor members of minority groups.

The Fourth Amendment of the U.S. Constitution, which guarantees against "unreasonable searches and seizures" and prohibits warrants on anything but "probable cause," is a casualty of the drug war. Other provisions intended to protect Americans from overzealous law enforcement—the right to defense counsel, the right to a fair trial, and the right to property—are also in danger. The debris of the war on drugs may ultimately include shreds of the Constitution as well as splintered doors, shattered glass, and broken furniture.

Since the early 1970s, almost all the searches and seizures reaching the U.S. Supreme Court have been upheld. The Court has held, for example, that a search made on an invalid warrant does not require any remedy so long as the police acted in "good faith." People may be stopped

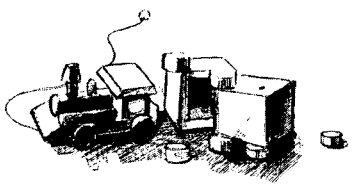
MARC MICHELON

in their cars, in airports, on trains, or on buses, and subjected to questioning and dog sniffs of their persons and possessions. Police may search an open field without warrant or cause, even if it has "no trespassing" signs and the police incursion is a criminal offense. They may also, as in Orwell's *1984*, conduct close helicopter surveillance of our homes and backyards. If it is outside the house, they may search our garbage without cause. If they have "reasonable suspicion," the police may even search our persons and possessions. Mobile homes, closed containers within cars, as well as cars themselves may be searched without a warrant.

Hispanics and "hippie types" bear the brunt of the drug-dealer profiles near our southern border, but young African Americans suffer from them throughout the country. An African American who drives a car with an out-of-state license plate is likely to be stopped almost anywhere he goes in the United States.

The Court has also held, in the 1985 case *United States v. Montoya De Hernandez*, that an international traveler, if a suspected "balloon swallower," may, without warrant or probable cause, be seized as she arrives at the airport, strip-searched, and ordered to remain incommunicado until she defecates over a wastebasket under the watchful eye of two matrons. In sanctioning such an 18-hour ordeal, Chief Justice William H. Rehnquist unabashedly listed other invasions that the Court had upheld: "[F]irst class mail may be opened without a warrant on less than probable cause....Automotive travelers may be stopped...near the border without individualized suspicion even if the stop is based largely on ethnicity...and boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever." Those incursions, as well as detention for defecation, Rehnquist said, are responses to "the veritable national crisis in law enforcement caused by smuggling of illegal narcotics."

In the compulsory defecation case, as in countless others, searches or seizures have been upheld on nothing more than "reasonable" or even "articulable" suspicion that drugs are being transported. That level of suspicion can be achieved by matching up the victim of the search or seizure with a few of the characteristics contained in secret "drug-courier profiles" that rely heavily upon ethnic stereotypes. As a result of such profiles, hundreds of innocent people are subjected to indignities every day.



Twenty-seven-year-old Kurt Disser is an example. A diamond dealer, he frequently drives between San Diego and Los Angeles on business. Sixty-six miles from the Mexican border, on Interstate Route 5, near San Clemente, the Immigration and Naturalization Service maintains a checkpoint, allegedly to detect illegal aliens but increasingly serving in the drug war. Most of the 115,000 drivers who pass through the checkpoint each day are merely required to slow down while an officer glances at them. Disser, however, was stopped and searched 15 of the 30 times he traversed the route during a 17-month period. On several occasions, he was frisked and his car trunk was searched. Drug-sniffing dogs were given repeated whiffs of Disser's car. Several times, agents told him the dogs detected drugs and this led to a full search. No evidence of drugs or criminality of any kind was ever found. Disser has no criminal record. He was stopped and searched solely because of his appearance (he has long hair and drives an elderly Cadillac, both characteristics apparently found in the profiles).

Hispanics and "hippie types" bear the brunt of the profiles near our southern border, but young African Americans suffer from them throughout the country. An African American who drives a car with an out-of-state license plate is likely to be stopped almost anywhere he goes in the United States. A survey of car stoppings on the New Jersey Turnpike revealed that, although only 4.7 percent of the cars were driven by blacks with out-of-state plates, 80 percent of the drug arrests were of such people. In 1991 the *Pittsburgh Press* examined 121 cases in which travelers were searched and no drugs were found. Seventy-seven percent of the people were black, Hispanic, or Asian. In Memphis, about 75 percent of the air travelers stopped by drug police in 1989 were black, yet only 4 percent of the flying public is black.

Almost as offensive as relying on racial characteristics in a profile to justify searches or seizures is permitting the trivial and subjective profile characteristics to count as "reasonable" or "articulable" suspicion. Warren Ferguson, a judge on the U.S. Court of Appeals for the Ninth Circuit, has observed that the Drug Enforcement Administration's profiles have a "chameleon-like way of adapting to any particular set of observations." In one case, a suspicious circumstance (profile characteristic) was deplaning first. In another, it was deplaning last. In a third, it was deplaning in the middle. A one-way ticket was said to be a suspicious circumstance in one case; a round-trip ticket was suspicious in another. Taking a nonstop flight was suspicious in one case, while changing planes was suspicious in another. Traveling alone fit a profile in one case; having a companion did so

in another. Behaving nervously was a tipoff in one case; acting calmly was suspicious in another.

Another favorite basis for suspicion is that the suspect is traveling to or from a major source city for drugs, even though every U.S. city with a major airport qualifies for that designation. Even the same agents take contradictory positions. In Tennessee, the *Pittsburgh Press* reports, an agent testified that he was leery of a man because he "walked quickly through the airport." Six weeks later, the same agent swore that his suspicions were aroused by a man because he "walked with intentional slowness after getting off the bus."

As even their users admit, the profiles are self-fulfilling. If the profiles are based on who is searched and found guilty, the guilty will necessarily fit the profiles. The DEA claims to catch 3,000 or more drug violators through the profiles, but no records are kept of how many people are hassled, detained, or searched to produce the 3,000. The DEA keeps no records of the profile system's *failures*.

Some numbers, however, are available. Rudy Sandoval, a commander of Denver's vice bureau, estimated that his police conducted 2,000 airport searches in 1990, yielding only 49 arrests. In Pittsburgh, where records were kept, 527 people were searched in 1990, and 49 were arrested. In the Buffalo airport, in 1989, 600 people were stopped by police and only 10 were arrested. Said George Pratt, a judge on the U.S. Court of Appeals for the Second Circuit: "It appears that they have sacrificed the Fourth Amendment by detaining 590 innocent people in order to arrest 10 who are not—all in the name of the 'war on drugs.' When, pray tell, will it end? Where are we going?"

What the drug war has done to the Fourth Amendment, it has also done to the Sixth. The Sixth Amendment guarantees, among other things, that in "all criminal prosecutions" the accused shall enjoy "the assistance of counsel for his defense." No other right is as precious to one accused of crime as the right of counsel. A loyal, competent lawyer is essential for the protection of every other right the defendant has, including the right to a fair trial.

In recognition of that fact, the definition of the enemy in the war against drugs has been expanded. Not only are drug sellers and drug users targets, so are their lawyers. Criminal-defense lawyers, especially if they practice in federal courts, have increasingly come to expect their law offices to be searched, their phones to be tapped, or their offices bugged. They are rarely surprised when they get Internal Revenue Service summonses seeking information about their criminal clients, about themselves, or about both.

Prosecutors frequently serve subpoenas on defense lawyers prior to trial, requiring them to produce documents and testify about their client before a grand jury, in secret. Having thus driven a wedge between client and attorney, creating mistrust of the lawyer at least and a disqualifying conflict of interest at worst, the prosecutor is then in a strong position to coerce a guilty plea or, in intractable cases, to seek disqualification of the lawyer on the eve of trial, when no other lawyer has time to prepare a defense.

Criminal-defense lawyers are now targets in the war against drugs. They have come to expect their law offices to be searched or bugged and their phones to be tapped. They are rarely surprised when they get Internal Revenue Service summonses seeking information about their criminal clients, about themselves, or about both.

The courts have upheld all these practices, the effect of which is to deprive the accused of his only real defensive armament. The Supreme Court added a powerful missile to the government's arsenal when it held, in the 1989 case *Caplin & Drysdale v. United States*, that federal authorities could freeze and later obtain the forfeiture of the assets of a person *accused* of a drug crime, so that he would have no money with which to pay a lawyer.

The centuries-old tradition that confidential conversations between a lawyer and client cannot be divulged without the consent of the client also seems headed for the basement of American legal history. Courts have held that because "monitoring" of conversations in jails and prisons is well-known, any attorney-client conversations that are eavesdropped upon or tapped are fair game—they have been implicitly "consented" to. This absurd fiction was even applied to Col. Manuel Noriega, who barely speaks English. After he was kidnapped in Panama and thrown in a Miami jail, his phone conversations with his lawyers were "monitored." A federal court found he waived his rights by talking on the phone.

Courts have expanded other exceptions to the attorney-client privilege to the point that little is left of the privilege in criminal prosecutions. Two exceptions together almost swallow the privilege: 1) If the attorney's services were sought, in whole or in part, to aid in the commission of a crime or a fraud, the crime-fraud exception applies; 2) if necessary to clear himself of suspicion, the attorney can disclose privileged confidential communications, even if they bury the client. In short, if the interests of attorney and client are in conflict, the interests of the attorney prevail.

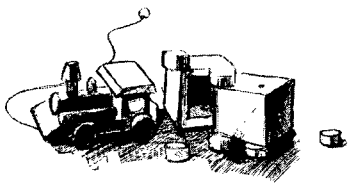
Anyone accused of being involved with illegal drugs who is (or ever has been) guilty of the crime charged or any other acquisitive crime and hires a lawyer is necessarily seeking, at least in part, to cover up past crimes and to avoid future claims against his assets, such as tax claims, forfeiture claims, and the like. Courts have ruled that it's enough for prosecutors to show there is "probable cause" to believe the attorney is helping his client achieve such objectives, which are usually regarded as impermissible. (Probable cause can even be based on the attorney-client conversations themselves.) It is not possible to separate consultations concerning past money-making crimes, to which the attorney-client privilege supposedly still applies, and consultations about future crimes or frauds, to which the privilege does not apply. Faced with such overlaps, courts commonly find there is no privilege.

The prevailing attitude in the courts is that almost any trial is too good for a person accused of a drug crime. In a 1987 interview, Supreme Court Justice Thurgood Marshall said, "If it's a dope case, I won't even read the petition. I ain't giving no break to no dope dealer." That statement produced neither criticism nor protest.

Even if the crime-fraud exception does not destroy the privilege, the second, save-the-lawyer-at-any-cost exception often will. A prosecutor can apparently trump the privilege simply by making insinuations about the complicity of counsel in the client's alleged criminal activities. The lawyer can then betray the client to clear himself. That this rule permits the prosecutor to destroy the accused's privilege by a mere insinuation seems not to bother either courts or experts on legal ethics.

Courts have also upheld recent requirements that criminal-defense lawyers report to the IRS anyone who pays them $10,000 or more in cash, whether a client or a third party. Attorneys who have refused to make such reports about their clients have been jailed. As of 1986, it is also a felony for anyone, including a lawyer, to accept money or property in excess of $10,000 that was derived from specified unlawful activity.

It is no defense for a lawyer or any other recipient that the money or property was received for legitimate goods or services, even essential legal services. Nor is it a defense that the attorney had nothing to do with the illegal activity that generated the money or property. Nor is it a defense that the attorney was unaware of the specific kind of criminal activity that produced the money. It is not even a defense for the attorney that he had no actual knowledge that the money or property was illegally derived. "Willful blindness" is a substitute for knowledge, and the lifestyle of the client—fitting stereotypes of how drug dealers comport themselves—may go far toward establishing the attorney's guilty "knowledge" or "willful blindness." Thus, an attorney who represents a person who is charged with a drug offense who "looks like" a drug dealer is at risk of being indicted also.



Defense lawyers therefore risk losing not only their fee but their freedom and their license to practice law for trying to protect the constitutional rights of their clients. And the possible charges against lawyers are not limited to accepting "tainted" money as payment of a fee. Lawyers who help their clients avoid indictment or who represent them in business dealings, such as real-estate transactions, can be indicted with the client for money laundering, tax evasion, or even drug trafficking. Attorneys who confine their professional activities solely to defending clients who have already been arrested on charges still risk their own indictment, for "obstruction of justice" if nothing else.

Nobody knows what the limits of that crime are. Many prosecutors think that anything a defense attorney does that might be helpful in defending the client is such an obstruction. Courts have not yet embraced that interpretation, but neither have they repudiated it. According to Columbia University law professor H. Richard Uviller, a former prosecutor, it is almost possible to say that the statute threatens a five-year penalty for virtually any conduct that the government deems evasive, abusive, or inconvenient while a judicial proceeding is pending.

It has always been difficult for persons accused of drug crimes to find competent attorneys willing to bear the stigma of being "a drug dealer's lawyer." But now that such attorneys also risk losing both their fees and their freedom, privately retained drug-defense lawyers are on their way to extinction—which is what the Congress and the Supreme Court appear to want.

Court opinions that chisel away at specific constitutional guarantees ought to be alarming to all who value liberty, but such decisions are at least visible and are subject to intense scrutiny and criticism. Legal scholar Steven Wisotsky calls the result of this chiseling process "the Emerging 'Drug Exception' to the Bill of Rights." A less visible and therefore more ominous "drug exception" corrodes the amorphous right to a fair trial protected by the Fifth and 14th Amendments' Due Process clauses.

In most drug prosecutions, the trial proceedings are ignored by the press and no opinions are written by the trial judges justifying or explaining their

rulings. Those accused of crime must rely on the integrity of appellate judges to scrutinize the record and ensure that the trial proceedings were fair and consistent with due process. Yet in many courts criminal convictions and long prison sentences are routinely upheld without even hearing argument of the appeal and without even the writing of an appellate opinion. In such cases, there is no basis for believing that the appellate judges bothered to read the briefs or understood the issues, much less that they dealt with them fairly.

The prevailing, although rarely acknowledged, attitude in American courts is that almost any trial is too good for a person accused of a drug crime. That attitude was succinctly displayed in a remark by one of the most liberal Supreme Court justices. In a 1987 interview with *Life*, Thurgood Marshall said, "If it's a dope case, I won't even read the petition. I ain't giving no break to no dope dealer." That statement caught the attention of some in the legal profession, but it produced neither a bark of criticism nor a paragraph of protest.

The pressures that the drug war have brought to bear on already overburdened courts have produced a breakdown in both their integrity and the respect in which they are held. Many defense lawyers and scholars are convinced that appellate judges will say anything to uphold a drug conviction. If such judges don't affirm without writing any opinion at all, they often issue unsigned opinions and, because such opinions are so shoddy, forbid their publication. The courts will not even allow lawyers to cite such "opinions" as precedent in other cases. Finally, when they do publish their opinions, judges often invent nonexistent "facts" to support their affirmances. Respect for the American judiciary by lawyers who appear before them has probably never been lower.

Occasionally, a judge rails against the trampling of rights under the tanks of the drug war. Usually, this is done as part of a multi-judge panel, where a judge can dissent from the decision of the majority while having no discernible effect on the outcome. Such dissenting opinions can ring the bells of freedom while the majority orders the defendant packed off to prison. The dissenter has little responsibility for what he says, since he is not deciding the case. Protests by judges at the trial level, where a single judge is responsible for the outcome, require more courage and happen less often.

One such judge was U.S. Magistrate Peter Nimkoff of Miami. Nimkoff frequently offended prosecutors and other judges by granting bail to defendants accused of major drug crimes. Most judges either order the defendant detained without any bail at all—a power given to them by the 1984 Bail Reform Act—or find out how much bail the defendant can post and then set bail at five or 10 times that amount. Nimkoff asserted that the Constitution presumes the innocence of all persons accused of crime, even a drug crime.

In a 1984 case, he blasted as "outrageous" the tactics of a DEA agent who, posing as a friend of a lawyer's client, tried to get the Miami attorney to divulge confidential communications from his client. DEA agents then tried to implicate the lawyer himself in an escape plot. Failing that, they obtained a search warrant on a fraudulent affidavit and thus were able to read privileged letters between attorney and client. In another case, Nimkoff denounced the DEA's use of a female informant who set up at least 40 men, enticing them into drug deals after developing a sexual relationship with them. The "boyfriend" would be busted, and the "girlfriend" would get paid by the DEA.

Finally, in 1986, Nimkoff had enough. He resigned to protest the relentless erosion of rights and the governmental abuses of power with which he was daily confronted. In a press conference, he decried the view "that there are two constitutions—one for criminal cases generally and another for drug cases." Such a view is not only wrong, he said. It "invites police officers to behave like criminals. And they do." Nimkoff's lamentations had the impact of a flower falling in the forest. Miami's major newspaper, the *Herald*, found nothing about his resignation or his press conference that warranted reporting.

Peter Nimkoff, a U.S. magistrate in Miami, resigned to protest the drug war's erosion of rights. He said, "There are two constitutions—one for criminal cases generally and another for drug cases," which "invites police officers to behave like criminals. And they do." The* Herald *did not find the judge's move worth reporting.

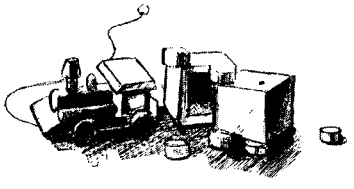
The drug war's threats to the Bill of Rights extend not only to those civil liberties favored by ACLU liberals but also to property rights. The signers of the Declaration of Independence believed, with John Locke, that the right of property was fundamental, inalienable, an aspect of humanity. They regarded liberty as impossible without property, which was the guardian of every other right. These beliefs are reflected in constitutional text. The Fifth Amendment declares that "no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." Under forfeiture statutes enacted since 1970, however, both deprivations occur routinely, with the approval of courts.

Under federal statutes, any property is subject to forfeiture if it is "used, or intended to be used, in any manner or part, to commit or to facilitate the commission" of a drug crime. (See "Ill-Gotten Gains," August/September 1993.) No one need be convicted or even accused of a crime for forfeiture to occur. Forfeiture is a "civil" matter. Title vests in the government instantly upon the existence of the use or the intention to use the property in connection with a drug offense. All the government needs to establish its right to seize the property is "probable cause," the same flimsy standard needed to get a search warrant.

A drug dealer, who owned a ranch in Georgia, had his 27 quarter horses seized on the theory that, as part of a legitimate business, the livestock helped create a "front" for the owner's illegal activities. The more "innocent" one's use of property is, the more effective it is as a "front" and therefore the more clearly forfeitable.

The government can take a home on no stronger a showing than it needs to take a look inside. Hearsay or even an anonymous informant can suffice. No legal proceedings are required before personal property may be seized. If the police have "probable cause" concerning a car, a boat, or an airplane, they just grab it. Although a hearing has to take place before property can be repossessed at the behest of a conditional seller, before a driver's license can be revoked, before welfare benefits can be terminated, and before a state employee can be fired, persons can have their motor homes confiscated without any proceedings of any kind, if the confiscation is a drug forfeiture. There may be a right to contest the forfeiture after the seizure, but even this right is lost if not promptly asserted. Moreover, the costs of hiring a lawyer and suing to recover the seized property may be prohibitive unless the seized property is of great value.

As construed by the courts, the forfeiture statutes also encourage police to make blatantly unconstitutional seizures. Property may be seized without probable cause—on a naked hunch—and still be retained and forfeited. Courts hold that illegally seized property may be forfeited if the police establish probable cause at the forfeiture proceeding itself. It doesn't matter that there was no cause whatever for the seizure; it doesn't matter that the seizure was illegal, even unconstitutional. If the government can later establish probable cause (through the seized property itself or investigation occurring after the seizure), that is sufficient to uphold a forfeiture.



If the government wants to seize real property without notice, it has to get a court's approval, but that is as easy as getting a search warrant. A seizure warrant is obtained in the same way as a search warrant and on the same hearsay grounds. In 1988, a six-story apartment building in New York, containing 41 apartments, was seized on such a warrant, which the appellate court upheld.

No civilized country imposes criminal punishment for mere evil intentions, but the forfeiture statutes—since they are "civil," not "criminal"—are apparently subject to no such limitation. In 1991 the U.S. Court of Appeals for the Third Circuit held that a home was forfeitable because the owner, when he applied for a home equity loan, "intended" to use the proceeds to buy drugs. By the time the loan actually came through, he had used other funds for that purpose, but that didn't matter, the court said, because he had *intended* to use the home to secure a loan, the proceeds of which he *intended* to use for drugs. The home was therefore no longer his. It would apparently have made no difference if he never even applied for the loan, as long as he thought about it.

Any activities within a home that relate to drugs are sufficient for forfeiture of the home: a phone call to or from a source; the possession of chemicals, wrappers, paraphernalia of any kind; the storing or reading of any how-to books on the cultivation or production of drugs. The operative question is whether any of these activities was "intended" to facilitate a drug offense.

If a car is driven to or from a place where drugs are bought or sold and is then parked in a garage attached to a home, the home has been used to store the car, which facilitated the transaction, and is probably forfeitable along with the car. If the home is located on a 120-acre farm, the entire farm goes as well. If only a few square feet of land in a remote section of a farm are devoted to marijuana plants, the grower loses not only the entire farm, but, if it is on the same land as the farm, his home as well.

Once any property qualifies for forfeiture, almost any other property owned or possessed by the same person can fall into the forfeiture pot. Notions about how otherwise "innocent" property can "facilitate" illegal activities are almost limitless. In a 1991 Hawaii case, when drug proceeds were deposited in a bank account that contained several hundred thousand dollars in "clean" funds, the entire account was declared forfeit on the theory that the "clean" funds facilitated the laundering of the tainted funds. In a 1989 case involving a drug dealer who owned and operated a ranch in Georgia, his quarter horses—all 27 of them—were forfeited on the theory that, as part of a legitimate business, the livestock helped create a "front" for the owner's illegal activities. On this theory, the more "innocent" one's use of property is, the more effec-

tive it is as a "front" or "cover" and therefore the more clearly forfeitable.

Entire hotels have been forfeited because one or more rooms were used by guests for drug transactions. Entire apartment houses have been lost because drug activities occurred in some apartments. In 1991 proceedings were brought to forfeit fraternity houses at the University of Virginia because some of the members sold drugs there. Those seizures created a stir, but they pale when compared to the potential. Imagine the government taking over New York's Plaza Hotel or one of the giant casino hotels in Atlantic City or Las Vegas on the same theory. Or taking over a company town because of a single drug sale or backyard marijuana plant. Harvard University is also available for the taking. There are certainly drug sales, drug use, even drug manufacturing taking place on campus.

Under federal law, property owners can defeat civil forfeiture if they can prove either that the claimed offending use did not occur and was not even intended, or that the offending use occurred or was intended "without the knowledge or consent of that owner." Unfortunately, even this seemingly clear provision provides little protection for innocent owners. Courts have treated "knowledge" and "willful blindness" as equivalents and have then merged "willful blindness" into "negligence."

Despite the plain language of the statute, most courts are unwilling to lift a forfeiture unless the owners can prove that the offending activity not only occurred without their knowledge or consent, but also that they did all that "reasonably could be expected to prevent the proscribed use of the property." The owner has been conscripted as a police officer to ensure that no improper use is made of the property. In a 1990 Milwaukee case, the owner of a 36-unit apartment building plagued by dope dealing evicted 10 tenants suspected of drug use, gave a master key to the police, forwarded tips to the police, and even hired two security firms. The city seized the building anyway.

If owners discover that their property is being used to "facilitate" drug use or sale, what can they do to ensure that they will not lose their property to forfeiture? Nothing, probably. If they call the police and inform on their tenants, they have established their knowledge, as of the date they informed, which will usually be sufficient for forfeiture. Informing the police may go far toward establishing that owners did not "consent" to the illicit use, but many courts have held that the owner must *both* lack knowledge *and* not consent to the illicit use.

As scary as forfeiture already is, it is spreading to other offenses. When it is extended to new areas, the punishment becomes drastically disproportionate to the offense and the constitutional safeguards of criminal procedure are circumvented. Already, federal forfeiture statutes apply to pornography, gambling, and several other offenses, as well as drugs. Some state forfeiture laws apply to property used in any felony. The forfeiture of cars used in sex offenses is commonplace. Hartford, Connecticut, recently began confiscating the cars of johns who cruise neighborhoods looking for prostitutes. Some states take one's car for drunk driving.

Where will it end? Why not extend forfeiture to income-tax evasion and take the homes of the millions—some say as many as 30 million—who cheat on their taxes? The statutory basis for forfeiting homes and businesses of tax evaders is already in place. The Internal Revenue Code reads: "It shall be unlawful to have or possess any property intended for use in violating the provisions of the Internal Revenue Service Laws...or which has been so used, and no property rights shall exist in any such property."

Although use of this provision has mainly been limited to seizures of moonshine and gambling equipment, and sometimes businesses, there is no reason, given the breadth of the drug forfeiture decisions, why it can't be employed to take the homes and offices of tax evaders and even those of their accountants and lawyers. A congressman who failed to pay Social Security tax on wages of his housekeeper could lose his home. Moreover, unlike drug forfeiture, the tax forfeiture statutes have no innocent-owner defense.

If there is a shard of moral justification for forfeiture, it is that an owner, duly forewarned, chooses to use or permit his property to be used illegally and therefore voluntarily "waives" his constitutional rights of property. But such a "waiver" theory can be extended to destroy all rights and all liberty. It is a cancer on the Constitution, certain to metastasize if not eliminated soon. ®

In a 1990 Milwaukee case, the owner of a 36-unit apartment building plagued by dope dealing evicted 10 tenants suspected of drug use, gave a master key to the police, forwarded tips to the police, and even hired two security firms. The city seized the building anyway.

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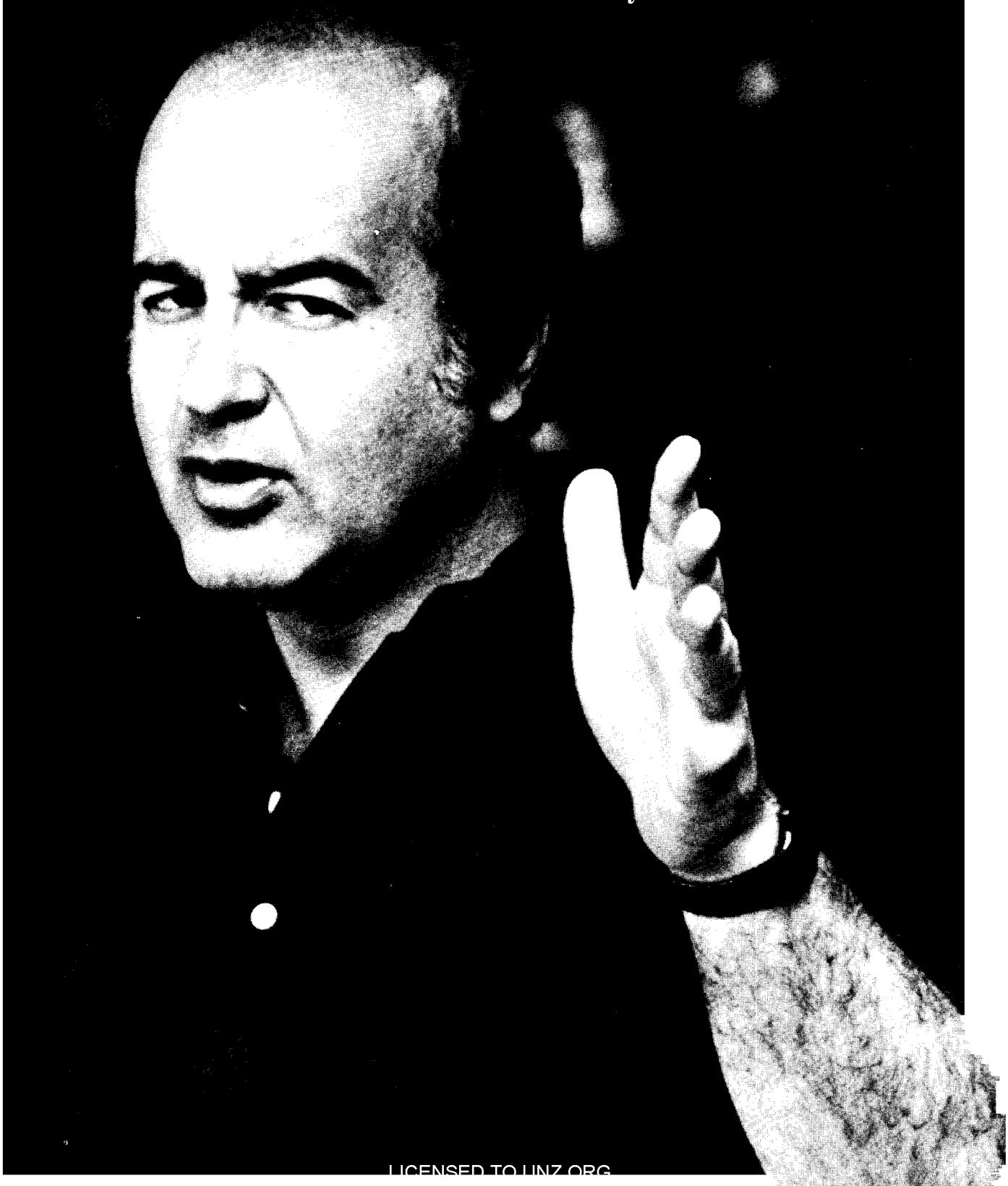
Outlaws and Addresses

Hernando De Soto's Path to Property Rights

Interviewed by Darío Fernández-Morera



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In seeking to make life easier for millions of Peruvians, Hernando De Soto has made his own life difficult. De Soto, the best-selling author of *The Other Path* (1989) and founder/director of Peru's Institute for Liberty and Democracy, is a champion of market economics and property rights in a part of the world that historically has shown little interest in such ideas. His efforts have led not only to political attacks from enfranchised power elites but to physical attacks from leftist groups, such as the Maoist Shining Path, who have placed him on the top of their hit list. His description of market mechanisms and the way they empower people has ramifications beyond the borders of Peru: Americans, De Soto wrote in *The New York Times*, have taken their economic and political systems for "granted, losing their ability to recognize and teach the importance of these institutions."

When I went to interview De Soto last July, the armed soldiers at the institute entrance ordered my taxi driver to park half-way down the block. A car bomb had recently killed several people at the site, and the soldiers were not taking any chances. After getting out of the taxi, I walked along the concrete wall surrounding the property over to the guard booth controlling access to the courtyard. I showed my passport, and the officer in charge made a phone call to the house inside while another soldier asked me to open my briefcase. When the officer learned that I was expected, he became friendlier. As I walked across the courtyard, I could see the debris that still cluttered the area: a memento of the Shining Path's bomb.

Reason: Your institute once interviewed a sample of 80 landowners in Peruvian agrarian communities and found that 70 of them did not regard themselves as belonging to the propertied class. How do you explain this curious self-image?

De Soto: Let me place that survey in context. When *The Other Path* was published, it became clear that, in Peru, there were two economies, one formal and one informal. The informal sector constituted between 50 and 60 percent of the total.

We examined the situation in the various government ministries and discovered a pattern of "invasion" of lands in Peru [owned by absentee landlords or by the government]. Who were these invaders? We found that they were farmers—informal agricultural entrepreneurs. From among the leaders of the invaders we selected 80. They were the most prosperous and therefore those with the most authority among these informals. Talking to these informal leaders, we asked them the question, "Do you consider yourself a member of the private sector?" "No," most of them answered. "Do you then consider yourself a member of the public sector?" we asked. "No," they said, "the public sector is the government, the state." Then we asked, "Who do you think belongs to the private sector?" "*Los de arriba*," those above, they said.

The contradictions were remarkable. For example, a prosperous informal businessman, president of the Peruvian Drivers' Federation, representing 300,000 drivers, was also member of the *Central de Trabajadores del Perú* [Central Union of Peruvian Workers], which is controlled by left-wingers. One day I asked him, "Look, you own a bus, but you talk as if you were a proletarian. You know that a union supposedly defends the salary of the proletarian against an owner, and tries to reduce the so-called surplus value, but you live off your own business. I'm sorry, but you are a capitalist!" He answered: "No, I'm not. Haven't you heard of *autoempresa* ["self-entrepreneurship"]? I am a worker in *autoempresa*." "Yes," I said, "I know about the *autoempresa*. In fact, I have a friend who has an *autopizzeria* ["self-owned pizza shop"], another who has an *autotienda* ["self-owned store"], and so on. I'm sorry, but there's no difference between you and them, except for the fact that you are marginalized by regulations, whereas they are officially licensed by the government."

This perception originates in the fact that in Peru there indeed exists a private sector, but it exists largely on the basis of competing for government favors, contracts, and privileges, and its economic approach is to try to exclude or marginalize competitors—not by outproducing them in quantity, quality, or prices, but through political means, from legislation to outright use of the many resources of legal coercion at the disposal of a modern state. This is why I have characterized the official Peruvian economy not as a free-market economy but as a mercantilist economy. The informal economy is much closer than the formal to what we call a market economy. Not only does it not function on the basis of political favors, but it often functions in spite of a government opposition incited by participants in the formal economy.

"The official Peruvian economy is not a free-market economy but a mercantilist economy. The informal economy, however, is much closer than the formal to what we call a market economy. Not only does it not function on the basis of political favors, but it often functions in spite of a government opposition incited by participants in the formal economy."

The organizations of Peruvian informals are much larger than such "proletarian" organizations as the Peruvian unions. Until seven or eight years ago, however,

they had a similar vocabulary. For example, the itinerant informal entrepreneurs called themselves a *sindicato de ambulantes* [syndicate of traveling salesmen] and had a red leadership. The transportation entrepreneurs called themselves *frentes de defensa del transporte* [fronts of defense of transportation]. The rhetoric which served as the discursive basis of this vast informal movement of businesspeople was actually left wing!

"Agrarian reform is the process where government assigns lands to the peasants. But the 'squatters' who we want to title and register are a different phenomenon. They have already created their own revolution. They do not need anybody, neither a party nor a government agency, to carry out a revolution for them—and it is a revolution that cannot be negotiated."

Reason: In the United States, local governments are often against informal businesses as well. I recall the case of a well-known newsstand in Chicago, which for many years had sold newspapers and magazines on one of the busiest avenues in the city. In 1992, the politically well-connected bigger stores in the area used the local government to eliminate this informal businessman under the pretext of "improving the appearance of Chicago's downtown."

De Soto: In Peru things have been worse, because the informal sector is much bigger and government regulations are more retrograde. When *The Other Path* was published, Lima's mayor was a man who considered himself a Marxist-Leninist (today we are very good friends). In order to "help" the informal salesmen, he and his council passed a set of regulations. After a bit of research, we showed him that at least one-third of his "progressive" piece of legislation was in fact made up of ideas indistinguishable from ideas developed by the Peruvian legal system during the time of the Spanish viceroys—from 1617 to 1670. We told him: "You know, these ideas of yours aren't very modern for a communist."

In fact, what this man wanted to do would hurt the informals he said he wanted to help: With the regulations and the taxes he was imposing on them, he would cut into the growing profits which had allowed them to open more than 331 new markets in Lima alone.

Little by little, we've been gaining ground. Of 112 informal organizations that we tried to win over, 111 have by now aligned themselves with us to fight in favor of what we call a market economy. We have been less successful with the formal organizations. We tried to unite the formal and informal entrepreneurs in what we called the *Confederación de Empresarios del Perú* [Confederation of Peruvian Entrepreneurs]. We wrote down the free-market principles and interests shared by all entrepreneurs. We pointed out that the problem which both formals and informals had to face was not a "class struggle" but rather how to handle the intrusion of the government in the activities of all businessmen in Peru. When we called a meeting, the informal organizations attended, but no formals showed up. Then we asked the formals: "Are you going to open your chambers of commerce to the informals?" They rejected the idea. These two groups continue to see themselves as making up two different social classes. One way of looking at this situation is to see the informals as the Boston Tea Party of Peru and the formals as the English entrepreneurs of King George III.

But we have at least opened the way for the eventual creation in Peru of a large, comprehensive entrepreneurial class like that of the United States, where a "small businessman" wants an America which is "good for business" and a "big businessman" wants the same thing. Of course there are differences between the two, but not an opposition, which is what has been happening traditionally in Peru between the informal and formal sectors.

Reason: What would you say is the difference between the institute's agenda of granting official property rights to their land to the informals and the old left-wing idea of "agrarian reform"?

De Soto: Agrarian reform is a process by means of which government assigns lands to the peasants. But when we talk about titling and registering those who have already occupied the lands, the "squatters," we are talking about a different phenomenon. The squatters have already created their own revolution. They do not need anybody, neither a party nor a government agency, to carry out a revolution for them. I am going to show you the real magnitude of this revolution so that you can see that this is not the sort of revolution that can be negotiated: 90 percent of the agrarian sector in Peru is informal.

Reason: Ninety percent?

De Soto: Yes. If we were talking about 5 percent, 10 percent, then you and I might leisurely converse about carrying out a *pequeña reforma* [a little agrarian reform], about giving to the informals land parcels in the jungle, or in the desert, etc. But when we're talking about 90 percent of the Peruvian land that produces agricultural goods which the population buys, it's too late. You can compare this situation with the Gold Rush in California, or with the "pre-emption laws," which were the "squatter laws" in the United States in the 19th century. The country has already been "taken."

In our case, the informals who occupy the lands have reached working agreements amongst themselves.

If you go and try to expropriate one of these people and send in troops to do so, your soldiers will come back in boxes. There is no way to touch these entrepreneurs. They get together and defend their private property with guns. All this indicates that there already is among them a de-facto norm of private property.

Reason: I have read that they have also killed Shining Path guerrillas. Does holding private property, even on an informal level, motivate the owners to oppose the anti–private-property ideology of groups like Shining Path or the Cuban-inspired and backed Tupac Amaru?

De Soto: Of course. But there is a reason that makes their political allegiance less easily predictable. The reason is that some communists, at least on this subject, have thought the matter through very well. Shining Path, in some cases, though not too efficiently, has begun to do what Ho Chi Minh did in Vietnam, namely to provide a "service" to the informal owners by giving them title to their property.

Reason: That is what your institute wants to do.

De Soto: Yes. Mao learned better than Chiang Kai-shek the lessons of the "home study," and Ho was a follower of Mao. The Americans also learned: When they occupied Japan, Taiwan, and South Korea, they titled and registered the poor landowners. The American military government even created organizations like the Joint Commission on Rural Reconstruction in Taiwan. The Americans contacted the informal sector directly. They didn't ask the official registrar services who owned what but instead asked the "land councils," which were the informal entrepreneurial associations. The Americans were right in supporting the informal property owners. Private property constitutes a formidable bastion against socialism.

Unfortunately, the Americans forgot all about that in Vietnam. Instead, they proceeded to implement "agrarian reform." They granted authority to the South Vietnamese *government* to parcel out the land according to a system of central planning and clarification of property ownership. Ho Chi Minh did rather what we are trying to do: to title the existing system.

If a government does not give to everyone the impression that it is really trying to improve things, it opens the possibility for the left to protest in the name of all the discontented people. One main reason why the informal sector has not become formal is that from Indonesia to Brazil, 90 percent of the informal lands are not titled and registered. This is a generalized phenomenon in the so-called Third World. And it has many consequences.

One is that the price of land drops because it is not legally registered as private property. In Peru, when we title these lands, the market value doubles the same day. After 10 years, it goes up nine times. The principal reason is that it is easier to trade the land once the property rights are clear and established.

Another consequence is credit worthiness. Everyone talks about creating credit systems for the less privileged. In the United States, up to 70 percent of starting businesses need credit, and they get it on the basis of some kind of real-property collateral. If you have a situation in which 90 percent of Peruvians in a particular sector of the economy do not have title to their property, they cannot get credit. Without clearly defined property rights, you can't even use the police to correct a problem such as coca production because you do not know who owns the land where the coca grows. Not having property rights means not having access to the property in all sorts of ways.

The question is: How is it that so many governments, from Suharto's in Indonesia to Fujimori's in Peru, have wanted to title these people and have not been able to do so effectively? One reason is that none of the state systems in Asia or Latin America can gather proof of informal titles. In Peru, the informals have means of proving property ownership to each other which are not the same means developed by the Spanish legal system. The informals have their own papers, their own forms of agreements, and their own systems of registration, all of which are very clearly stated in the maps which they use for their own informal business transactions.

If you take a walk through the countryside, from Indonesia to Peru, and you walk by field after field—in each field a different dog is going to bark at you. Even dogs know what private property is all about. The only one who does not know it is the government. The issue is that there exists a "common law" and an "informal law" which the Latin American formal legal system does not know how to recognize.

"If you take a walk through the countryside, from Indonesia to Peru, and you walk by field after field—in each field a different dog is going to bark at you. Even dogs know what private property is all about. The only one who does not know it is the government. The Latin American legal system must learn to recognize this system of 'common law.'"

We have been working for eight years and have created a system that recognizes it. And we have been making it work in Peru. And we are about to finish titling 120,000 informal properties in Peru. We are now working on a report of our efforts: "Transforming Poor People's Land into Wealth," or "The Only System for the Titling and Registration of Informal Property." We

are already moving from the theory of private ownership to how to create it.

Reason: Some intellectual circles in the United States believe that Shining Path has much popular support in spite of its thousands of murders and sabotages of the Peruvian economy.

De Soto: Undoubtedly some Peruvians, many of them university students and faculty, sympathize with Shining Path. But it is evident from the way Peruvians *vote* in elections in which Shining Path has issued precise instructions *not* to vote, that the vast majority of Peruvians do not. Some people give tangential support to Shining Path, not with the objective of having Shining Path eventually govern, but of putting pressure on the government to change its attitude toward them. No one estimates that Shining Path has troops in excess of 5,000 in a country of 23 million. There are far stronger guerrilla movements in other parts of the world. When ex-professor Abimail Guzmán [captured leader of Shining Path] spoke on television from his jail (he was allowed to speak for 15 to 20 minutes, uninterrupted, to both the Peruvian and the world population), his convoluted speech might have been understood by a few specialists on China politics, but aside from them, this man had nothing to communicate.

"TV cops in Peru always search for criminals by helicopter, not by car, because there are no street addresses. It has been said that there is no workable police force without addresses. There is no workable market economy without addresses, either. For that you need property rights. The first characteristic of an outlaw is that he has no address."

Reason: How does the institute approach the ecological problems in large cities like Lima, where non–free-market environmentalists blame much of the decay in the quality of life on the abundance of informal entrepreneurs and the lack of government regulation of their activities?

De Soto: I am going to give you an answer related more to the countryside than to the city, simply because the argument comes out more clearly there. But the principles are the same and are applicable to the city problems. The answer is to establish property rights which are formalized and, along with them, establish both incentives and responsibilities on the part of the property owner.

One of the great worries of anyone concerned about the environment is that at the very sources of the Amazon one finds an enormous amount of pollution due to the dumping of thousands of tons of sulfuric acid, kerosene, and other such chemicals. Well, these chemicals are there simply because that's where peasants manufacture coca paste.

The major reason they make coca paste is that these entrepreneurs have no security with respect to their property, because it is informal property and therefore not "legal." They have no incentive to plant, for example, oil palms, which in five years will give them an economic benefit six times greater than planting coca. To produce palm oil, you have to be able to wait five years, while coca grows like weeds, without any need for care and time. And if you don't have clear property rights, you can't get the credit necessary to grow crops that require more investment capital than coca. Finally, if you have a coca field, and the police go after you, you know it is better to have your coca in small lots.

Reason: So that when the police arrive and you flee, your losses are relatively small.

De Soto: Exactly. But the problem is that if what you own as an informal entrepreneur is only a couple of hectares, you can't start growing, say, commercial cocoa, because the Hershey company is not going to bother buying the amount of cocoa that you can produce there. The end result of all this is that the informals have all sorts of negative externalities because they do not have the legal infrastructure of a market economy that would allow them to solve the difficulties associated with production. From the moment you give these people property rights which are well-protected and transferable, you not only give them incentives to increase production, you also make them accountable and responsible for what they do produce.

Look, you turn on your TV and see a program like *Miami Vice*, where these two good-looking gentlemen go in their beautiful cars after drug dealers. They search for the "Colombians" at 353 Sewer Street, but find that the drug dealers are gone, and now have moved to 301 Huntington Drive, and so the heroes go again after them—all you hear are addresses. But when you see the police in the *Alto Ballague* in Peru, you see them in a helicopter, floating above the tree tops. There are no addresses. It has been said that there is no workable police force without addresses. Well, there is no workable market economy without addresses, either. And for that you need property rights. The first characteristic of an outlaw is...

Reason: That he does not have an address.

De Soto: Exactly. Until you have universal, well-protected, clear, and transferable private property rights, you cannot have a market economy in Peru, in the ghetto, or anywhere else. And you are going to have all the problems those places have. ®

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Child Abuse

In the name of protecting kids from harm, social workers subject them to cruel and unusual punishment.

ROBERT L. SMITH

By Hannah B. Lapp

The first time I heard of Billy Stefan's plight, he had just celebrated his 15th birthday at a Bradford, Pennsylvania, children's home. Family members had visited him, bringing lots of birthday presents. But for Billy, it all ended in tears. "Daddy, why can't I go along home?" he had pleaded.

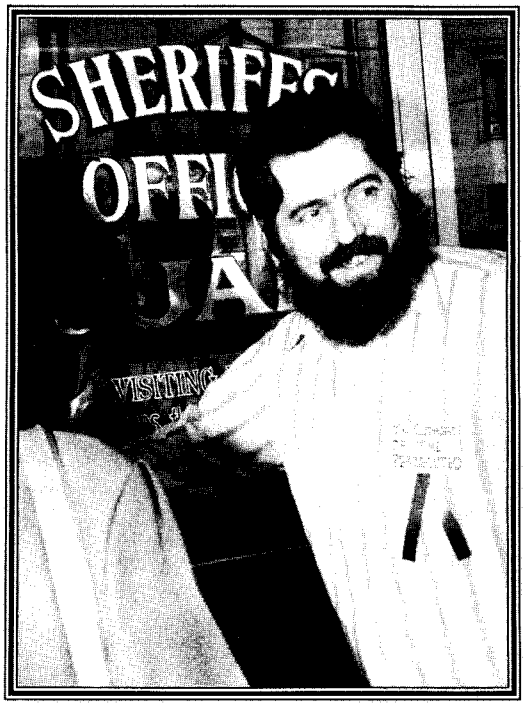
It was Billy's determination and that of his older brothers—Tom, 17, Kevin, 19, and Ron, 20—that convinced me to include their case in my research on abuses by child-protection agencies. Their father, Donald, who owns a welding business in Yorkshire, a small town in Cattaraugus County, New York, had sought help from several of the numerous advocacy groups that fight arbitrary official intervention in families. My sister, Barbara Lyn Lapp, runs a chapter of one such group, Victims of Child Abuse Laws (VOCAL), in nearby Chautauqua County. Her efforts to help the Stefans would ultimately land her in jail.

Donald Stefan's grievances were not much different from the hundreds of others heard each year by organizations like VOCAL: The state had cried child abuse; the parent had cried foul. Then I saw copies of letters the boys had written their family-court judge during the time they were separated from their father and institutionalized. The case cried out for answers. Why, in this era of emphasis on children's rights, did the desperate pleas of two teenaged boys go unheeded?

The bureaucracy in which the Stefan family finds itself mired is a formidable system, supported by billions of dollars in federal and state funding each year. Federal law requires every state to have an agency within its Department of Social Services that fights child abuse. Usually called Child Protective Services, this agency has offices in every county. Among other things, CPS caseworkers are supposed to identify children who are suffer-

ing abuse, remove them from their homes if necessary, and seek a family-court order to place them in a safer environment.

Within this system, children have less protection than an accused murderer, a civil defendant, or even a target of asset forfeiture. A child can be removed from his home at a caseworker's discretion; the government need not show probable cause. To keep him locked away from his family indefinitely, the Department of Social Services attorney need only convince a judge by "a fair preponderance of the evidence"—a much weaker standard than "beyond a reasonable doubt"—that the child is neglected or in danger at home. Parents are generally represented by an attorney who rebuts the state's case. Although the judge appoints a "law guardian" to serve as the child's advocate, the child is usually not present, and his wishes count for little or nothing. All this is done under a legal cloak of secrecy, ostensibly to protect the child.



Donald Stefan went to jail rather than reveal his son's whereabouts.

Author Mary Pride calls the CPS system "The Child Abuse Industry" in a 1986 book by that title. Others who have investigated its performance describe it as chaotic and inept. (See "Kindergarten Commissars," July 1992.) But the CPS system usually avoids scrutiny by hiding behind secrecy laws. To examine the flesh-and-blood consequences of child-protection policies, we have to ask those who have been inside the system: the social worker who gives up her job to break the silence, the parents who protest, and the children whose interests the system is supposed to promote. Their testimony contradicts the government's claim that it is helping families and protecting children from abuse.

Billy was 14 and his brother Tom was 16 on May 28, 1992, when two Cattaraugus County CPS employees, flanked by police, descended on their country home and took them away. Their case became one of the 136,000 reports recorded by the New York State Central Register for Child Abuse and Neglect that year. The person who placed the call to the CPS hotline remains anonymous.

Donald Stefan and his wife, Linda, had been having marital problems for several years; they were separated on and off. But Donald didn't expect Linda's sudden accusation that he had beaten and molested his son. Much less did he expect that CPS would accept such a claim without talking to the rest of the family.

The Stefans recall an altercation between Donald and his youngest son the day Billy was alleged to have been beaten, but no one other than Linda felt it constituted abuse. Billy and his father, interviewed separately, call it a "spanking" in response to foul language the child had used, and both admit it developed into a father-son scuffle. According to Billy and numerous people who saw him on the day of the incident and the day afterward at school, the confrontation left him with one visible mark, a small scratch on his cheek.

But Linda, who was not a witness, gave a very different account of the incident, portraying it as a serious assault. And Billy, who says his mother paid him to lie, initially confirmed that his father had sexually abused him. (He later recanted and, together with his brothers, rose to his father's defense.) The authorities moved immediately to pick Billy up.

Billy was placed in a "safe house" with his mother, and his older brother Tom volunteered to go along because he felt Billy needed him. "We were both crying," Tom remembers. "Billy didn't want to go, but Chuck Talbot [their caseworker] said they'd put him in a foster home if he didn't get in the car." Standing by in disbelief were the boys' older brothers and cousins, an aunt, and their grandmother, Effie Stefan, all of whom were more than willing to take care of them. In the weeks that followed, the Cattaraugus County Department of Social Services, which oversees CPS, would cut Tom and Billy off from contact with all relatives except their mother; shuttle them from one institution to another, including a mental hospital; "treat" them with psychotropic drugs; send the police after them when they tried to escape; and subject them to physical abuse—all without hearing the boys or their family (other than Donald and Linda) in court.

Advocates of the family-court system believe the task of determining "the best interests of the child" should be left to caseworkers, court-appointed psychologists, court-appointed law guardians, and the court itself. When the Stefan boys and others like them appeal to public officials, they are told, in essence, that children don't know what's good for them and can't handle open court, so they'd better leave such matters to those who know better. Chautauqua County Social Services Commissioner Edwin Minor dismisses complaints about arbitrary removals of children from their homes with this assertion: "All children want to return home; the more abused they are, the stronger is their desire to go back."

Added to the profound stupidity of children as envisioned by Minor et al. is the mindset propagated by our modern child-sav-

RON MOSCATI

ing movement, which suspects every parent of child abuse and portrays the family as "the most dangerous institution that exists" (the view of a psychologist who appeared on a recent PBS documentary). The thrust is clear: We can't trust anyone—except the government and those it empowers to determine "the best interests of the child." Furthermore, the issue of child abuse is supposed to be so sensitive that it can be dealt with only in secret by family court and social-service departments. Unfortunately, these agencies have often demonstrated that they can be trusted more to enhance their own images and paychecks than to serve the needs of children.

Ten years ago, when I first started researching child abuse, I never considered that cases such as the Stefans' could exist. I read Dr. Vincent Fontana's book *Somewhere a Child Is Crying* and raged within at the callousness of officials who refuse to remove children from homes where they are being abused. I joined in "the fight against child abuse" by donating money to organizations such as I Care. It was a continuation of a family tradition in a sense—the same urge to reach out to society's less fortunate members that had led my parents to inquire into the plight of Korean War orphans even while they struggled to raise 12 children of their own.

It wasn't long, though, before I began to question the philosophy I encountered at child-abuse agencies. Government social workers, for example, commonly argue that all physical discipline is abuse and should be outlawed. Where does that put *my* parents, who employed an occasional spanking in raising their children? Today, those honestly concerned about the mistreatment of children are forced to scrutinize the child-protection agencies as well. For the bureaucratic monster that has emerged from the save-the-children movement cannot be defended even by its creators, much less by ordinary citizens with humane sensibilities.

In many cases, foster parents who start out with noble aspirations of improving children's lives later drop out of the system, appalled at the senselessness they witness. Beverly McCoy, a New York foster parent, says she and her husband took a young child as a way of emulating Beverly's great aunt, known for her motherly kindness. But the McCoys soon realized that their own efforts could accomplish little in the face of the callousness of the social-service officials who control foster children's destinies. "They destroyed all the good I tried to do," she says.

Child-protection agencies themselves complain about the high burnout rate among their staff and yearn for the day when their employees can feel happy about coming to work. And meanwhile, private efforts to relieve the suffering of children either become hopelessly enmeshed in existing bureaucracies or are chastised for their independence from established procedure.

My sister Barbara Lyn is a children's advocate who feels so betrayed by the system that she finds herself at odds with the very agencies she previously respected as guardians of children. Last year her involvement with VOCAL led her into the Stefan case—and ultimately into jail, for harboring Billy Stefan after his escape from the Bradford Children's Home.

Billy remembers vividly the day last April when his father came to visit him at Bradford and, instead of offering the usual pained good-bye, took him home. (Billy's older brother Tom had been released by then into his grandmother's custody; he had ultimately returned home to his father, contrary to the family court's order, but the authorities had not pursued him.) "Billy, I'm not going to let you get hurt no more," Donald Stefan vowed.

Fifteen days later, on May 5, Stefan backed up his vow by accepting jail rather than reveal to Family Court Judge Michael Nenno where he had hidden his son. "Judge, I cannot tell you," he explained when hauled into court. "I promised those boys that I will protect them under all circumstances. I'm not going to break my promise to those boys. They trust me." The angry judge assured Stefan that he would stay in jail until he decided to disclose where Billy was hiding.

Several weeks later, my sister was also behind bars after informing officials that Billy was safe and sound at her home. For harboring Billy and refusing to surrender him, she was convicted of obstructing governmental administration and sentenced to six months in Chautauqua County Jail. She would have been released in December, but on November 19 she was convicted of obstructing governmental administration and resisting arrest, charges stemming from an August 16 rally on her behalf outside the Chautauqua County Courthouse. Four other people, including my father, Jacob; my sister Rachel; my brother-in-law Joe Torres; and a family friend, Lynn Carroll, were also convicted on charges related to the non-violent protest. They were scheduled to be sentenced in December.

The dire circumstances that prompted Donald Stefan and my sister to face jail in order to bring Billy relief are not unique. It is rare for a family to challenge the authorities so directly. But from time to time, usually in cases involving middle-class families with community support and impeccable characters, the victims make themselves heard.

Unlike the Stefans, David and Tobi Miller did not defy a court order, but the Phoenix couple's insistence on maintaining their innocence and their use of the news media were enough to incense their caseworkers, who branded them "hostile." Thanks to the risk the Millers took in publicizing their 1989 case, involving a sexual-abuse allegation by a troubled neighborhood child, we now have access to inside information on CPS practices.

The Millers were promised that if they brought their three children, ages 7, 10, and 12, to county offices to be interviewed, they would not be taken away. The promise was broken as soon as the family arrived at the office. Pelvic examinations, which turned up no evidence of sexual abuse, were immediately performed on the children without the consent or presence of anyone they knew. The three children were separated from each other and from their parents for six months, the amount of time it took the family court to recognize that their home was not abusive after all. During this period, the children endured "therapy" sessions that turned into grueling, high-pressure interrogations. Videotapes of the sessions give a sense of the CPS modus operandi.

In a session with 7-year-old Randy, the interviewer, Tascha Boychuck, says: "I heard something happened to your butt or your dick."

Randy: "Pff" (hyperventilating, says he is thirsty).

Boychuck: "OK, and I need to understand what that was."

Randy: "Pff. I don't know."

Boychuck: "Why don't you tell me who it was that did something to one or those two parts?"

Randy: "Michael gave me a bloody nose." (Describes fight with a friend.)

Boychuck: "OK, Sweetie, look here (forces close-range eye contact with child). That's not what we're talking about, OK? The part we need to understand is what happened to you, OK?"

Randy: "Nothing happened to me. We only got yelled at."

A dozen or more times Boychuck refers to Randy's private parts, displays anatomically correct dolls, and asks what happened. She continues until Randy starts crying, then continues until he throws his head back and howls, "I don't want to talk to you anymore!"

Still she persists, forcing eye contact: "I can see you sit there and you're going—like you're so upset. And I can tell that you're trying to keep things inside." She withholds Kleenex and a drink through dozens more questions, until at one point she gets a barely perceptible nod from the child.

Boychuck: "OK, and did he put his mouth on your dick?"

Randy: "No."

Boychuck: "Or both?"

Randy: "Nope."

Boychuck continues to refer to the little nod, accusing Randy of changing his mind. Finally Randy gets so uncooperative that the interview is discontinued. Despite consistent denial of abuse from all three children, CPS remained unwilling to admit its mistake.

Billy and Tom Stefan recall similar pressure to implicate their father in child molestation. Billy says that when he tried to recant the sexual-abuse charge his mother paid him to make, social workers would have none of it. Tom remembers a caseworker insisting to Billy's face that it had to be true, because "children don't just make things up."

Tobi Miller, at the time of her family's ordeal, put it this way: "They kidnapped my children and are holding them hostage. Their spirits are being destroyed and their bodies have been violated by doctors....All their rights have been taken away from them."

I ask Jason Miller, who was 12 years old at the time of the crisis and is now 16, whether anyone in the system took his own wishes seriously. "No," he says, "they just took it upon themselves to say what's best for us." He remembers repeatedly telling his caseworker, his law guardian, and even his judge (by letter) that he wanted to go home. "Most people think we have a problem," Jason wrote. "The problem started when the state took my sister, my brother, and myself from our parents for no reason at all."

Jason says he was told that he would be returned after one night. Instead, he was cooped up month after month in what was called a shelter: "It wasn't very nice....I was lonesome every day....The sanitation wasn't good, and there were roaches." No phone calls were allowed, and Jason's parents never received the letters he tried to mail to them. A lock system prevented escape. "It was very unfair," he says. "I wouldn't want any other child to have to go through that."

Speaking to Jason, as to the Stefans, reminds me of an observation by author Luise Armstrong that kids in state custody "have had a fundamental sense of control wrested from them." Armstrong, who has written a book about incest and another about foster care, is not talking only about kids who were never abused at home. In *Solomon Says: A Speakout on Foster Care*, she interviews dozens of people involved with the system, including foster children, and discovers that, even when a home situation is bad, life in foster care is usually worse.

Armstrong interviews former caseworkers, who confess being caught up "in the power I had over children." They admit the uselessness of their paperwork, their accusing labels, and their "services." A family-court judge bemoans a system that has more to do with "power-base issues" than with children, who are merely pawns. "We jump over them, we kick them over," she says. Armstrong views the whole system as a "ghastly game with eternally arbitrary and chaotic dictates, and entirely random results."

Richard Wexler, another journalist who criticizes CPS practices, writes in his 1990 book, *Wounded Innocents*: "The war against child abuse has become a war against children." He cites the precipitous nabbing and strip-searching of children by poorly trained caseworkers, hostility toward low-income families, and the trauma suffered by children separated from good parents. He documents the abuse and murder of children in foster care, contending that untold numbers of children are dying from careless social-work practices.

Like Luise Armstrong, Wexler exposes the stunning incompetence and chaos within what he calls "a system out of control." And like Armstrong, he allows us to hear the child victims themselves. A former foster child who'd been through 10 different placements tells him: "You learn not to reach out, not to care, not to feel. The kids that emerge [from foster care] are dead....It's been killed...whatever it is that makes people human."

The General Accounting Office reports that the number of children in foster care rose 55 percent between 1985 and 1991. The number will continue to rise, the GAO says, as long as the federal government pays for removing children from their homes but not for services that might keep a troubled family together.

Vincent Fontana—who boasts that his 30 years of work against child abuse have brought children to the point where they can say to their elders, "Don't hit me, or I'll call Dr. Fontana"—is himself troubled at the system he helped to create. He admits that we have all the same problems we did decades ago, before an intense child-abuse awareness campaign, and he's frustrated: "It's a system that doesn't work." Some experts are calling for a total rebuilding of the nation's child-protection system. Says the National Center for Child Abuse and Neglect: "The CPS system is like a 911 number that cannot distinguish a murder in progress from littering."

In Arizona, the state Civil Liberties Union issued a report in 1992 condemning the violation of children's rights by CPS. Among the problems cited are the incommunicado isolation of

children, CPS workers who are cynical and offer no hope to families, and court records contaminated by a host of facts that do not prove child abuse (such as the bathing of a 4-year-old child by his parents, or kissing and hugging "too much" during visits). "Once the child is removed," the report states, "the system will go to any lengths to sustain their charges, even in the face of copious evidence they have made a mistake." The report also cited experimentation on children with treatments given sex offenders, including the use of penile devices, nude photographs, and noxious odors.

Barbara Lyn Lapp was sentenced to six months in jail for harboring Billy Stefan.

In 1992 New York state's Commission on Quality Control released a report that criticizes the liberal use of psychotropic drugs on children in state mental-health facilities. In 51 percent of the cases examined by the commission, children were drugged without the consent of a parent or guardian. Only 33 percent of children receiving anti-psychotic medications had a diagnosed psychotic disorder. Both Tom and Billy Stefan were treated for acting up with potent psychoactive substances that have numerous possible side effects, including fainting, heart failure, confusion, agitation, seizures, and psychomotor and mental retardation. Both boys experienced some of these symptoms after being drugged. Neither of them had needed psychiatric medication before they were removed from their home.

The Commission on Quality Control also criticized the frequent use of punishments that deprive children of essential family and social contact. Although the commission found that children in state institutions were well cared for physically, the report concludes that "in a real sense these children are often deprived of their childhood, first by the desperate conditions in their family lives, and then by the very design of the service systems."

New York Commissioner of Social Services Mary Jo Bane complained that "the report's caustic criticism and the condemnation of the whole system is not justified." She objected to the suggestion of local oversight panels, saying that "decisions regarding child placement should be left to the party with the legal authority to act." Bane's defensiveness reflects the main problem in the child-welfare system: power without accountability. Officials are always promising reform, but nothing ever changes that fundamental reality.

One former CPS worker describes the system as "a world all its own...like being in the high school gang: either you play their game, or you're out." The weak ethics and ignorance of family realities among members of her CPS unit didn't matter, she says. What mattered was maintaining the gang and the "'let's go get 'em' mentality." This social worker put conscience over career and dropped out.

In fairness, her description of apathy and incompetence does not apply to all caseworkers; the problem with the CPS system is not personnel. The problem lies in assuming that we can safely hand over broad powers to government without public oversight and constitutional constraints. The kind of reforms being proposed by social-service agencies do not address this issue at all. Rather, they involve expanded government powers and increased funding. Without radical reform, kids like Billy Stefan will continue to wait for relief.

"It's taking too long," Billy says. He lives in fear—not of his father but of the people who tore him from the security of home and family. He's suspicious of police and anything even remotely connected to Social Services. He's wary of all medication, even aspirin. He finds it difficult to trust anyone outside his family. At night he's tormented by dreams about "things Social Services did to me" and "them coming for me."

During his imprisonment by the county, Billy says, he would try to run back home, only to be tackled and pinned down. He says hospital staff gave him "shots in the rear" when he acted up, and they would sometimes bend his leg backwards to subdue him. "It hurt like hell," he recalls. His eyes, usually glazed over with dread when he brings back those memories, pierce into mine for an instant as he tries to explain. "Why?" he asks over and over again. "What do they want, keep me for a pet or something?" Billy has trouble making sense out of how so many men and women who don't know him can be so intent on getting their hands on him. And his family, even his father, has trouble giving him answers.

Donald Stefan was released from jail September 1 after serving four months for contempt of court. Billy Stefan remains free, but Judge Nenno has warned his father that he will go back to jail if he goes near the boy. Billy writes to his law guardian, his judge, to Social Services, and to "anyone who cares," asking to be left alone so that he can enjoy the simple pleasure of being home with his father. So far, no one seems to be listening. ®

Hannah B. Lapp is a dairy farmer and free-lance writer in Cassadaga, New York.

LYNN CAROLL-BEDFORD

Deficit Chickens

By Rick Henderson

How President Clinton beat back the threat of real budget cuts.

Cutting Remarks: Congressmen Tim Penny (right) and John Kasich talk on a radio show about their plan to cut an additional $90 billion from President Clinton's proposed five-year budget plan.

JUST BEFORE THANKSGIVING, Bill Clinton established once and for all that he is, in fact, a traditional, tax-and-spend Democrat and that his oft-stated concerns about the budget deficit are simply a cover for raising taxes. In a frantic, pre-holiday lobbying campaign, he led a crusade to defeat a modest deficit-reduction plan offered by Reps. Tim Penny (D-Minn.) and John Kasich (R-Ohio). The Penny-Kasich plan, which would have cut spending by a mere 1 percent over the next five years, made the big spenders apoplectic. Penny-Kasich didn't pass, but the frenzy to defeat it clearly demonstrates that the Washington establishment has no intention of loosening its grip on Americans' wallets.

Clinton has the same view of deficits as Ronald Reagan: Big deficits can preclude spending on new programs. While Reagan used deficits to keep big spenders at bay, Clinton finds deficits an impediment to his ambitious agenda. At a speech in Santa Monica, California, last February, Clinton warned that, unless the deficit is reduced, entitlement spending and interest on the national debt would leave him only "three or four cents on the dollar" for health-care reform, national service, "investment," and so on. The spending limits in Penny-Kasich would have thwarted Clinton's plans.

Back in August, when he was trying to get his budget passed, Clinton made a deal with moderate and conservative Democrats who argued the plan relied too much on higher taxes or didn't cut spending early and often enough: Vote for the budget, and the moderates—including Penny—could propose a new set of spending cuts in the fall. (Clinton made a similar agreement with Sen. Bob Kerrey of Nebraska.) They relented. Clinton's budget passed by one vote in the House and by Vice President Al Gore's tie-breaker in the Senate.

Democratic leaders thought they were off the hook. They obviously didn't understand how painful the vote was to moderate Democrats. Citing his frustration with the recalcitrance of the pro-spending groups in Washington, the 42-year-old Penny announced that he would resign from the House at the end of his term.

And the following weekend's talk shows prominently featured freshman Rep. Marjorie Margolies-Mezvinsky (D-Pa.), who cast the decisive vote. *The Almanac of American Politics 1994* calls Margolies-Mezvinsky's district a "quintessentially Republican seat." Margolies-Mezvinsky had run for the open seat in 1992 as both a liberal and a deficit hawk, winning by only 1,300 votes. She had announced her opposition to the Clinton budget a couple of hours before the vote.

Margolies-Mezvinsky had to be bullied into changing her position. The televised images of a harried, almost-tearful member of Congress explaining her switch made Margolies-Mezvinsky an instant, if unintentional, celebrity.

These bullying tactics also provided an opportunity for the moderates to demand that Clinton deliver on his promise. Penny got Clinton and House Speaker Tom Foley to agree to a vote on spending cuts before the House adjourned in November. When Clinton offered his "rescission" package, House members could propose amendments that would be voted on individually, without any revisions, at that time.

The White House and Democratic leaders obviously underestimated how serious reform-minded Democrats were about extra cuts. Instead of squabbling among themselves about little cuts, Penny and the moderates decided to put together a single package of substantial cuts. Penny then met with Kasich, who had unsuccessfully offered his own detailed alternative to Clinton's plan, which would have achieved similar deficit cuts with less spending and fewer taxes. (See "The Energizer," August/September.)

Penny and Kasich formed a 30-member task force composed of 19 Democrats and 11 Republicans to draft a detailed package of additional cuts. Along with such congressional veterans as Alex McMillan (R-N.C), Robert Walker (R-Pa.), Charles Stenholm (D-Tex.), and Dave McCurdy (D-Okla.), the task force

STEPHEN CROWLEY

included 14 freshmen—among them, Marjorie Margolies-Mezvinsky.

On October 27, the task force proposed specific cuts that would reduce spending by $103 billion over five years. The plan had a big hook: Every dollar cut from spending would also reduce the spending caps enacted in Clinton's budget. In other words, Congress couldn't take money cut from these programs and spend it somewhere else without busting Clinton's budget deal.

The initial package included more than 90 specific program cuts. Twenty-eight percent of the savings resulted from eliminating or privatizing programs, the rest from program reforms. Thirty-four billion dollars came from means-testing Medicare. The plan increased the physicians' fees and premiums paid by people who earn more than $75,000 a year; it instituted 20-percent co-payments for home health care and clinical lab services from people with incomes more than 150 percent above the poverty line.

The plan cut retirement benefits for government employees, raising the age of civilian retirement from 55 to 65 and deferring cost-of-living adjustments for military retirees younger than 62. It cut $5 billion in payments to NATO and other collective-security organizations; defunded weapons programs for a grenade launcher, a cargo plane, and a helicopter; and cut foreign aid by $5 billion. It eliminated the Interstate Commerce Commission and combined the Departments of Commerce, Energy, and Environment, NASA, and the National Science Foundation into a single cabinet-level agency, the Department of Science.

The plan also locked in proposals made by Clinton's National Performance Review: Cut 252,000 federal jobs; eliminate Department of Agriculture and Army Corps of Engineers field offices; and raise the threshold for the Davis-Bacon Act from $2,000 to $100,000, so that its prevailing-wage provisions apply to fewer federal contracts. Kerrey and Sen. Hank Brown (R-Colo.) offered a similar package of cuts totaling $109 billion that they will propose this spring.

With few exceptions, the Penny-Kasich plan barely registered on Beltway radar screens until the November 19 vote approached. The Concord Coalition, the deficit-fighting group started by former Sens. Paul Tsongas and Warren Rudman, immediately endorsed Penny-Kasich. Spokesman Fred Bucher says the coalition urged its 100,000 members to telephone and write members of Congress and to call radio talk shows to drum up support for the plan.

Clinton was so busy getting the North American Free Trade Agreement passed that he ignored the spending proposals. A week before the scheduled vote, the White House and House Democratic leaders started paying attention. They panicked. Budget Director Leon Panetta said Penny-Kasich would jeopardize the Clinton presidency; the defense cuts "would be a very, very severe blow" to military force structure and morale. Deputy Budget Director Alice Rivlin warned that the $8 billion in cuts scheduled to take effect in 1994 could throw the economy into a recession. (Of course, the $1.9 billion in extra cuts Clinton proposed wouldn't.) Clinton himself said Penny-Kasich "would remove the possibility of health-care reform."

Penny expressed surprise that the administration would put on such an intensive lobbying campaign to defeat a bill that might be picked apart in the Senate or that Clinton could veto. But the last thing Clinton wanted to do was veto a true spending-cut package, no matter how modest. It would be easier to derail the bill in the House than to publicly oppose deficit reduction.

Special-interest pleaders—the American Legion, the American Association of Retired Persons—sent letters and orchestrated phone calls to congressional offices. When the amendment was debated on the floor of the House, several members held up stacks of letters they had received from pro-spending groups. Rep. Rob Portman (R-Ohio) said he received 62 letters from special-interest groups in the four days preceding the vote. Even *The New York Times* editorial page, which had praised Kasich's earlier budget alternative, said, "Congress would do grave damage if it passed the Penny-Kasich bill."

Inside the House, Budget Committee Chairman Martin Sabo (D-Minn.) circulated a nine-page attack, headed by a "Dear Colleague" letter titled, "Penny-Kasich kills health care reform." He claimed the increased Medicare charges for upper-income Americans was "a tax on the sick."

A handful of moderate Republicans on the Appropriations Committee also did their best to sabotage the plan. Under the co-signatures of the ranking Democrats, three ranking Republican members on appropriations subcommittees, Iowa's Jim Lightfoot, Indiana's John Myers, and New Mexico's Joe Skeen, sent letters to Republicans, threatening to cut funding to projects in Republican districts if the members voted for Penny-Kasich. *The Washington Times* reproduced one of the letters. Penny said the lobbying campaign was "almost enough to make me vomit."

White House criticism of the spending cuts rang hollow: The same day Panetta and Rivlin hyperventilated to the press corps, Medicare administrator Bruce C. Vladeck testified before a congressional subcommittee on the $124 billion in Medicare cuts Clinton has proposed. Vladeck said cuts of that magnitude—more than three times the cuts in Penny-Kasich—"will only reduce the growth in Medicare spending from triple the inflation rate to double," without "putting Medicare beneficiaries at risk."

Meanwhile, Penny and Kasich tried to make the proposal more palatable to hawkish Democrats. They exempted current military and civilian federal employees from the retirement cuts; only persons who enlisted or were hired after January 1, 1994, would face their restrictions. (This reduced Penny-Kasich's deficit reductions from $103 billion to $90 billion.)

To allow full debate and a vote on a campaign-finance bill, Foley initially delayed the Penny-Kasich vote until Friday, November 20. Democratic leaders made

a head count on the 18th. The amendment looked as if it might pass. Foley then postponed the vote until Monday the 22nd, hoping somebody could derail the plan.

The panic that ensued is reminiscent of the scene in *Blazing Saddles* in which a frenzied Gov. William J. Le Petomane (Mel Brooks) tells a room full of his cronies, "We've got to protect our phoney-baloney jobs."

The White House increased the cuts in its rescission package from $12 billion over five years to $37 billion by incorporating the proposals in the National Performance Review. And the House Rules Committee proposed an inventive way to dampen the spending-cut fever. In a secret meeting, the committee voted to allow only three amendments to get to the floor: Clinton's enhanced plan (which was sponsored by Sabo), Penny-Kasich, and a $51-billion amendment sponsored by Barney Frank (D-Mass.) and Christopher Shays (R-Conn.) that reduced overseas military spending and eliminated several big-science projects. Neither the Clinton plan nor Frank-Shays earmarked their budget cuts for deficit reduction.

THIS RULE ALSO GAVE CLINTON AND Foley a chance to renege on their agreement with the moderates: Because these amendments weren't vetted by the Ways and Means and Appropriations committees (where they would have been picked apart), the Rules Committee's plan had to be approved by the entire House. Otherwise no spending-cut amendment would have been presented.

Given the chance, other members would have offered amendments. For instance, Rep. Dick Zimmer (R-N.J) proposed repealing $60 billion in taxes from the Clinton budget—retroactive taxes, Social Security increases, and the 4.3-cent gas tax. Another amendment by Rep. Steve Horn (R-Calif.) would have instituted a "flexible freeze" until fiscal year 2000. These proposals were shut out.

The rule passed the entire House, though not without grumbling from Republicans. On the floor, Kasich said, "I think the rule stinks, but [I support it] because it's the only way we'll get to vote for Penny-Kasich."

When the debate on the Sabo and Penny-Kasich amendments began, apocalyptic language flew. Opponents of Penny-Kasich paraded representatives of every spending interest imaginable: the elderly, the poor, environmentalists, veterans, teachers. They acted as if the end of Western Civilization were nigh. Foes called Penny-Kasich "draconian," "dangerous," "sick," "mean-sprited," "a sham," "a burning bush that threatens to consume us all."

Some old war horses trotted out to trash the plan. Ways and Means Chairman Dan Rostenkowski (D-Ill.): "When we disregard regular order, we do so at our peril." Subcommittee on Crime and Criminal Justice Chairman Charles Schumer (D-N.Y.): Penny-Kasich "eviscerates our national crime strategy."

Then there was the rambling harangue by Energy and Commerce Committee Chairman John Dingell (D-Mich.). Dingell railed against the Penny-Kasich task force as a group who suffered from a "complete unawareness of what they're doing" and had created a "fiscally irresponsible monster."

What obviously stuck in Dingell's craw was the proposed Department of Science, which he ranted about as he pointed to a chart of its likely organization. Had Penny-Kasich passed, Dingell would have lost his power to micromanage three cabinet-level agencies. Or at least, he would have had to carve away territory from Science, Space, and Technology Chairman George Brown (D-Calif.).

Supporters of the plan attacked the hyperactive rhetoric. Minority Whip Newt Gingrich said opponents of the bill were arguing, "If you vote for a penny in cuts that are real...the Corps of Engineers [will be] smaller than it was when Robert E. Lee was a colonel in St. Louis." Martin Hoke (R-Ohio) noted that Clinton's budget will "increase spending by 20 percent over the the next five years. Instead, [Penny-Kasich will] increase spending by 19 percent."

Much of the passion for Penny-Kasich came from Democrats. Stenholm: "The same people who opposed the balanced-budget amendment because it didn't make hard choices oppose [Penny-Kasich] because it makes hard choices." Gary Condit (D-Calif.): "One of the things I worry least about is that Congress will pass enough deficit reduction to hamper the economy." Margolies-Mezvinsky: "This isn't about President Clinton's future. It's about Chelsea's."

Stenholm and McCurdy tried to reassure their hawkish colleagues that the defense cuts in the plan weren't too severe. They did not prevail. The amendment lost, 213-219, with only 57 Democratic votes. (Eighteen Republicans voted against Penny-Kasich. And while 43 of 48 Republican freshmen voted for the amendment, they were joined by only 21 of the 66 Democratic freshmen.)

THE PENNY-KASICH PLAN WAS EXTRAORdinary for two reasons: It reached the floor of the House for a vote, and it almost passed. In a telephone interview the day after the vote, Penny tells me "defense Democrats" and Republican appropriators cost them the vote. "If the Republicans had voted as a bloc, we could have won with 45 Democrats."

What happens next? "The first person to call me when I returned to my office [after the vote] was Sen. Bob Kerrey," Penny says. If the Kerrey-Brown package gets through the Senate, the House will get another shot at deficit reduction. "There's also next year's budget resolution," he says.

"If we had lost by a large margin," says Penny, "I would have been bitter. But we were only four votes short." And he says the fight for spending cuts "wasn't a waste of time. It challenged the status quo and threatened the Washington power brokers."

Meeting with reporters right after the vote, Penny was asked if he regretted voting for the president's budget. "I'm beginning to," he said. ®

Rick Henderson is Washington editor of REASON.

Insurance Salesmen

By John Hood

Big, bad insurance companies aren't blocking ClintonCare. They're helping it along.

When Hillary Rodham Clinton stepped up to the podium at the American Academy of Pediatrics annual meeting in Washington on November 1, her political strategy was clear. To blunt growing criticism of the Clinton health plan, it was time to target a new villain. Drug companies, the old standbys, had made perfectly good punching bags for the Clintons throughout 1993. But since pharmaceuticals account for only 8 percent of health-care spending, there was an obvious limit to how much blame the industry could shoulder.

It was time to go after the insurance companies. "One of the great lies that is currently afoot in the country is that the president's plan will limit choice," Hillary Clinton said, responding to powerful insurer-sponsored TV ads challenging the Clinton plan. "To the contrary, the president's plan enhances choice." Then she continued shrilly, "It is time for you and for every American to stand up and say to the insurance industry: Enough is enough—we want our health-care system back." Loud applause.

The First Lady was being cleverly disingenuous. She actually likes a lot of what's going on in the $300-billion-a-year insurance industry, which is reacting to the prospect of federal control by accelerating toward a major shakeout. In 1991, more than half of the 150 million Americans covered by employee-sponsored insurance plans were enrolled in some type of managed-care program—a category including health-maintenance organizations, preferred-provided organizations, and similar networks of health providers and funders. In 1980, only 5 percent of insured Americans were in managed care programs. The Clinton plan is predicated on the notion that managed care is the answer to America's health problems, arguing that traditional doctor-patient-insurer relationships are inefficient and can't control costs.

Furthermore, the largest commercial insurers, the so-called Big Five—Prudential, Cigna, Met Life, Travelers, and Aetna—are moving rapidly out of the traditional insurance business and into managed care, as are the 71 nonprofit Blue Cross and Blue Shield associations. Already, 43 percent of all HMOs nationwide are owned by commercial insurance companies or Blue Cross, and that number is growing day by day.

In short, the Big Five and the Blues expect to survive the coming insurance industry shakeout. When the Clintons' "health alliances" select the few plans in each geographical area they will offer to subscribers, these firms are confident they will pass muster. To Mrs. Clinton, they say, in effect, "Sock it to us."

The Clinton health plan (in its latest, though potentially not last, incarnation) imposes strict rules on the plans that will be available to Americans. Each will have to include at least the minimum benefits identified by the federal government. Plans cannot turn down applicants for any reason and cannot charge different premiums based on health risk. To be approved by a health alliance, a plan will have to make it through a gauntlet of applications, hearings, and approval deliberations. It will help to have a large stable of lobbyists, in-house lawyers, public-relations specialists, and compliance officials.

A health alliance is, in fact, a cartel and, for all these reasons and more, is most likely to include only the largest firms in each market. Medium-size and small insurers who simply want to provide traditional indemnity and catastrophic coverage to employers and individuals will have no meaningful role in a cartelized market. A few will survive—in rural areas where HMOs can't function, for example—but most will vanish.

The Washington-based Health Insurance Association of America represents almost 300 of these threatened firms (serving about 35 percent of the market), and it—not the Big Five—is the organization behind the commercials that drove Mrs. Clinton to throw her carefully calculated fit. HIAA members understand all too well what the Clintons intend. "It's politically correct from [the administration's] point of view to put black hats on us," said Bill Gradison, HIAA president and a former congressman, at an October 12 news conference to rebut earlier shots across the bow by President Clinton.

Perhaps the administration had expected the HIAA to wither under fire. Less than two years ago, after all, Washington

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cognoscenti were writing the group's obituaries, as the Big Five pulled out of the association and embraced national health insurance along "managed competition" lines.

For years, the association had tried to straddle the fence between the large firms that paid the bills and the small firms that made up the bulk of its membership. Even so, it could never accommodate the divergent interests within the industry. The Big Five do most of their business with large, self-funded corporate health plans. This fact, together with their recent investment in HMOs, led the large firms to push the HIAA to embrace key elements of the managed competition model, such as health alliances, the virtual elimination of underwriting, and significant government control of premiums. As their smaller peers in the HIAA continued to resist these positions—particularly the notion that every insurer must take everyone regardless of risk and without significant difference in price—the Big Five began to withdraw from the association.

Cigna went first, in early 1992. Robert O'Brien, the firm's executive vice president, was a member of the Jackson Hole Group (a Wyoming-based think tank that originated the "managed competition" model) and saw little need to continue an affiliation with the HIAA. After health-care reform is enacted, he predicted to *Congressional Quarterly* in March, "about half of the insurance companies would be knocked out." Sharing Cigna's view that many HIAA members were doomed and that the association was taking too combative a stance, Aetna, Met Life, and Travelers withdrew over the next year. Finally, the last holdout, Prudential, left the HIAA in November 1993.

The Big Five moved much of their lobbying activity and political muscle to a new group, the Alliance for Managed Competition, as well as the Group Health Association of America, the major trade group for HMOs. These groups have been active behind the scenes in making conciliatory gestures to the Clinton health task force and members of Congress who support one or more of the various "moderate" managed competition plans. Public outreach efforts have included full-page ads in Beltway publications such as *National Journal* and *The New Republic*. While resisting taking specific positions in the ongoing debate, the Alliance for Managed Competition favors much of the Clinton approach but would rather see health alliances be voluntary rather than coercive monopolies.

The HIAA, for its part, has followed a more confrontational approach. Its budget suffered the loss of its biggest funders, but the association plowed its remaining reserves into a $6.5-million advertising campaign. Throughout 1993, the association zeroed in on the leaked drafts of the Clinton health plan, arguing for consumer choice and against global budgets set by the federal government.

The HIAA's alternative to the Clinton plan is itself deeply flawed. Its call for universal coverage, rather than universal access, opens the door to the Clintons' more expansive view of government's role.

You've seen their ads, touting an HIAA-backed group known as the Coalition for Health Insurance Choices. In one a couple sits at a kitchen table talking about global budgets. "The government caps how much the country can spend on health care," says the woman. Her husband interrupts: "So, what if your health plan runs out of money?" She shakes her head. "There's got to be a better way."

The problem with the HIAA, though, is that its "better way" is itself deeply flawed, granting a great deal of territory to the Clintons. The HIAA endorses a government mandate that everyone buy relatively generous insurance. "Universal, cradle-to-grave coverage must be achieved," the HIAA's plan reads, "by re-

quiring all employers and individuals to pay for an essential package of benefits which should include primary, preventive, and catastrophic coverage."

The HIAA's plan eschews global budgeting, monopoly health alliances, and price controls, and would allow more variation in premiums than would the Clinton plan. But if you grant the necessity for every American to be in a government-approved "plan"—rather than just ensuring access to care through consumer choice of catastrophic insurance and medical savings—then you open the door widely to the Clintons' more expansive view of the role of the federal government. All you can do then is quibble over what will be in the standard package.

TO FIND HEALTH INSURERS WHO WANT to stay in the business of managing risk rather than managing care and who perceive excessive third-party payment for medical services as a major cost-driver, you have to travel across the Potomac from the HIAA's still-plush offices in D.C. to a modest outfit in Alexandria, Virginia, called the Council for Affordable Health Insurance. Formed in March 1992, the organization currently has 32 members, mostly insurers in small-group or supplemental markets. Member insurers, including Universe Life in Lewiston, Idaho and Golden Rule Insurance in Indianapolis, cover about 4 million Americans.

Greg Scandlen, who heads the council, says that the concept of tax-free medical savings accounts is the cornerstone of his group's reform agenda, as are insurance reforms that would guarantee re-issue of policies after an insured person is in the system, extension of tax deductibility to individually purchased insurance, and the creation of "risk pools" for those with preexisting medical conditions who cannot qualify for private coverage.

Scandlen endorses plans such as Texas Sen. Phil Gramm's bill, which would allow people to self-insure with medical savings accounts and which focuses on the uninsured, rather than overturning the entire system. The HIAA, Scandlen says, has not been confrontational enough and has alienated potential allies such as the small-business lobby (by endorsing employer mandates), doctors (by promoting managed care as the solution to cost containment), and health underwriters (who'll be unemployed if the federal government eliminates true insurance).

Still, the HIAA is doing a good job in attacking the Clinton plan on television, something the council could never afford to do. And there is evidence that the HIAA's campaign is working. After a brief spike in the support for the Clinton plan right after the president's September 22 speech to the nation, Americans became increasingly skeptical of it, no doubt affected by the ads as well as comments by independent analysts and members of Congress. A *USA Today*/CNN poll by Gallup in late September found 59 percent of Americans in favor of the Clinton plan and 33 percent opposed, but by late November, after Clinton had presented his bill to Congress, another *USA Today*/CNN survey found 52 percent in favor and 41 percent opposed.

In polls, Americans express general satisfaction with their own health care and insurance, a little uncertainty about future coverage and the potential for "job lock" because of illness, a suspicion of any plan that sounds too "complex," and concern for the uninsured. This seems to be a mandate for something very similar to what Gramm, the Council for Affordable Health Insurance, and other market-oriented senators and organizations are pushing. "For us," Scandlen admits, "the process is going along just peachy."

That's why Mrs. Clinton felt it necessary to go after the small private insurers who won't make it into any government-created cartels. Unfortunately for the administration, they're fighting back—and, to some extent in spite of themselves, they may well succeed in stopping the administration's forcible takeover of one-seventh of the nation's economy. ®

Contributing Editor John Hood is vice president of the John Locke Foundation in Raleigh, North Carolina, and a syndicated columnist.

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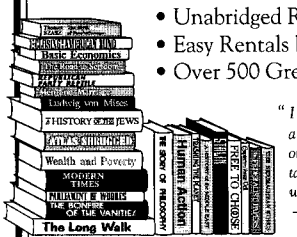

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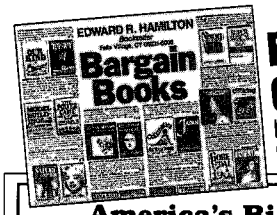

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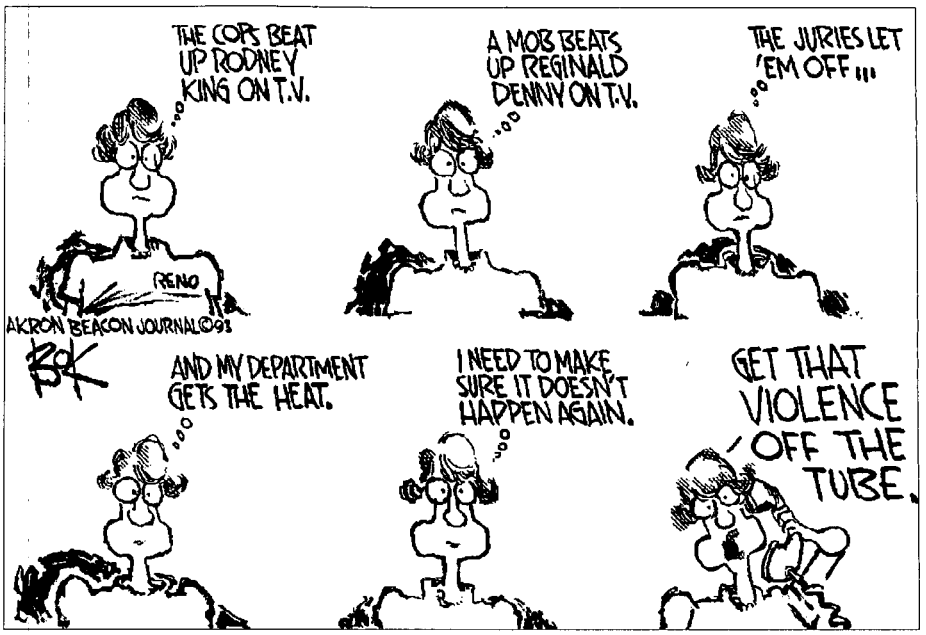
Déjà Viewing

By Steve Kurtz

Congressional hearings on TV violence are repeat offenders.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GET THAT VIOLENCE OFF THE TUBE.

I WAS WATCHING C-SPAN, BUT IT COULD have been *Monty Python's Flying Circus*. Attorney General Janet Reno thought the best way to get a *voluntary* solution was by threatening government intervention. Sen. Byron Dorgan (D-N.D.) said he didn't like being called a censor and then asked the assembled Hollywood representatives if *they* thought he was one. Sen. Ernest Hollings (D-S.C.) suggested cutting dangerous scenes from classic films and demonstrated his familiarity with popular culture by referring to *Beavis and Butt-head* as *Buffcoat and Beaver*.

But for all the intriguing things said at the Senate hearings on TV violence, the main feeling it inspired was déjà vu. The reformers claimed the "problem" was more serious than ever and getting worse. They asserted that common sense was on their side and they downplayed, if not openly mocked, the idea that personal and parental responsibility could solve the problem (or that such responsibility may ultimately be the only real solution). And of course, they said they were *extremely* unwilling to have the government step in but were forced to by an irresponsible and perverse entertainment industry.

Would-be censors change their instruments now and then, but they always play the same old tune. Trouble is, the hysterical jig they whip through lends itself more to demagoguery than deliberation. A review of previous moral panics makes the TV-violence hearings seem like just another sad song.

In 1922, shaken by the Fatty Arbuckle scandal and unnerved by recently passed state censorship laws and the threat of federal action, movie moguls hired Postmaster General Will H. Hays to head a "self-regulatory" board overseeing the content of their films. In 1930, the Hays Office adopted the Production Code, written by Jesuit priest Daniel A. Lord and publisher Martin Quigley. With no enforcement mechanism, however, the new code had little effect.

Then in October 1933, the Most Rev. Amleto Giovanni Cicognani declared "immoral motion pictures" were responsible for the "massacre of [the] innocence of youth." (This is a common theme in censorship movements: *Children* are the reason censorship is necessary, and therefore those who oppose reform lack compassion.) Cicognani's complaint struck a chord with many Catholic leaders and, by April 1934, the Legion of Decency was formed. Members signed pledges condemning "indecent and immoral motion pictures, and those which glorify crime or criminals" and swore not to attend "places of amusement which show them as a matter of policy." The Legion's position had an ecumenical appeal: Groups such as the B'nai B'rith, Elks, Knights of Columbus, Masons, and Odd Fellows supported it.

The Federal Council of Churches jumped on the bandwagon and, foreshadowing Reno's call for "voluntary" controls or else, warned filmmakers to mend their ways or there'd be federal legislation. Hollywood responded swiftly and, in July 1934, it hired Joseph Breen to head the newly formed Production Code Administration.

FROM THAT DATE ON, STUDIOS SUBMITTED all screenplays to the PCA for detailed recommendations on the changes required by the code. Even optioned stories and plays generally got advisory opinions from Breen. The PCA screened all movies before release and suggested more alterations. Until a film met with Breen's approval, it could not be released.

The Production Code did more than clean up dirty movies. While it's true that nudity, even in silhouette, was forbidden, and expletives such as *lousy*, *cripes*, and *nerts* could not be spoken, the code also prohibited the questioning of social institutions and norms. No Hollywood picture

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could ridicule a religious figure or faith, and the flag could not be shown disrespectfully. The court system could never appear unjust. The sanctity of marriage and home had to be upheld, divorce could never seem positive, and adultery could never seem exciting. Kidnapped children were to be returned unharmed, and childbirth could not be presented in any detail. The existence of drug trafficking, homosexuality, miscegenation, prostitution, and venereal disease couldn't be depicted. The word *abortion* was not even to be spoken, and if the subject was even intimated it had to be strongly condemned. Dances with excessive body movement and stationary feet were forbidden, too.

When Broadway hits were adapted for the screen, moviegoers were "protected" from words and plots in the original stage versions. Foreign films with adult themes, seen by millions overseas without apparently hurting the moral fiber of those nations, had trouble getting exhibited in the United States. Michael Medved's favorite film, *Mr. Smith Goes to Washington,* almost wasn't made; Breen warned that the novel it was based on had enormous adaptation problems since the book actually suggested, among other things, that senators are controlled by lobbyists.

BUT EVEN WITH THE SILVER SCREEN FEATURING films sanitized for their protection, kids seemed less moral than ever. By the late '40s, reformers discovered a new culprit leading them down the road to ruin: comic books. Child psychiatrist Frederic Wertham was convinced that juvenile delinquency was due to the baneful influence of comics. Wertham, like many who support governmental restrictions on speech to alter children's behavior, treated kids as innocent, empty vessels waiting to be filled with any negative influence that came their way.

His main evidence was that delinquents read violent comic books. He condemned not just the brutality in crime comics and the gore in horror comics but also the general influence of superhero, science fiction, western, and even educational comic books. He argued in his book *Seduction of the Innocent* that Batman and Robin's lifestyle was "like a wish dream for two homosexuals living together," that Wonder Woman was a lesbian who frightened boys and created a "morbid ideal" for girls, and that "Superman undermines the authority and dignity of the ordinary man and woman."

Parents' groups organized boycotts and comic-book burnings. States and counties considered legislation against the new peril. The crowning glory of the crusade came in April 1954, when Sen. Estes Kefauver (D-Tenn.) called a Senate hearing on the issue. In an unwitting prologue to today's hearings on TV violence, a group of self-styled children's advocates laid out the case against the offensive material.

The Production Code did more than clean up dirty movies. It prohibited the questioning of social institutions and norms. Many issues were simply off-limits.

Wertham was the star witness for the prosecution. He claimed that comics glamorized evil and violence, even when good won in the end. Like many censors, he portrayed himself as a small voice, armed only with the truth, speaking out against a powerful industry. He stated, "I am not advocating censorship" and implied that, in fact, the comics industry was out to censor *him.*

William Gaines, publisher of E.C., where the greatest—and most gruesome—comics were created, spoke for the defense. He said he trusted kids and believed "nobody has ever been ruined by a comic." This line of defense didn't go over too well, and the committee questioned him at length, in tones that ranged from doubtful to contemptuous. Investigator Herbert Beaser asked, with some exasperation, "Is the sole test of what you put into your magazines whether it sells?"

Though no legislation came out of the hearings, the industry got the message. They adopted a stringent code of ethics and appointed juvenile delinquency expert Judge Charles F. Murphy as comic-book czar. Horror comics got the death penalty, and crime stories were put on probation. Any comic that didn't receive the Seal of Approval from the Comics Code Authority would not be displayed by wholesalers. (Gaines took his only remaining successful comic, *Mad,* and turned it into a slick-format magazine so it wouldn't be covered by the code.

Soon enough, comic books were squeaky clean, but juveniles were more delinquent than ever. Rock and roll, with its suggestive lyrics, provocative performers, and, perhaps most important, its growing popularity, seemed as likely a culprit as anything else. A number of anti-rock movements flourished in the late '50s, including one fronted by Mitch Miller (of *Sing-Along with Mitch* fame), whose music was no longer in vogue. Never greatly successful in influencing the direction of pop music, the anti-rock mentality has still shown remarkable resilience.

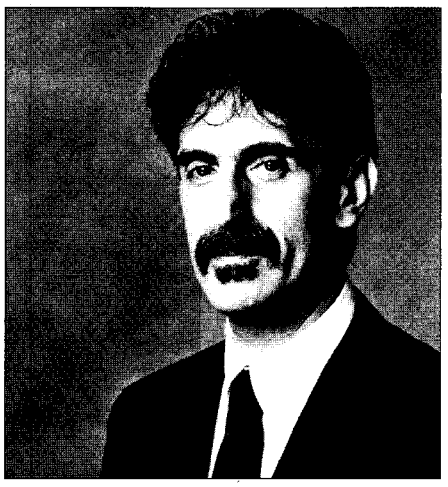
An especially high-profile campaign began in the spring of 1985, when Tipper Gore realized her daughter was listening to a Prince song ("Darling Nikki") containing a reference to masturbation. Shocked by such racy lyrics, Gore got together with the also outraged (over Madonna's "Like a Virgin") Susan Baker—wife of then–Treasury Secretary James Baker—and some other friends to found the Parents' Music Resource Center. Soon the group included eight other senators' wives (B.A. Bentsen, Penny Durenberger, Teresa Heinz, Peatsy Hollings, Georgia Packwood, Jeanne H. Simon, Nancy Thurmond, and Rosemary D. Trible) as well as wives of representatives and prominent Washington businessmen. This was one grass-roots movement that started at the top.

The PMRC stuck to the tried-and-true formula favored by would-be censors.

Anecdotal evidence was used extensively to document the grave danger posed by pop music. Susan Baker linked dangerous lyrics to dangerous behaviors, such as the case of the "young man who took his life while listening to the music of AC/DC." "He was not the first," she opined. (She also claimed that songs incited rape and unwanted pregnancies.) The group made striking, if weak, analogies: Giving people the entertainment they desire is like drug dealing; "harmful" music should be treated like poison or pollution. Strained interpretation of the material at hand was common, while humor, irony, and even entertainment value went undetected. (As an indirect result of PMRC lobbying, for example, Frank Zappa's *Jazz in Hell* album, which was entirely instrumental, ended up with a "parental advisory" sticker.)

Armed with little sociological evidence but immense influence, the PMRC wrote to Stanley Gortikov, president of the Recording Industry Association of America, expressing their displeasure. Gortikov, fearing the group's powerful Washington connections, agreed to warning labels on releases with potentially offensive words. Encouraged rather than satisfied by this response, the group made new demands: They wanted all 25,000 songs released each year rated. They wanted "D/A" ratings for drugs and alcohol, "V" for violence, "O" for occult, and "X" for explicit lyrics. They wanted all lyrics printed on the outside of the music package, and they wanted all hidden messages and "backward masking" removed.

On September 19, 1985, the Senate Commerce Committee convened hearings on rock lyrics. It was a media circus, and almost every senator involved had a chance to express official disapproval. Sen. Albert Gore (D-Tenn.) questioned the motives of industry officials, asking what sort of "contribution they want[ed] to make to society," and wondered aloud if this was "the way they want to earn a living." Sen. Slade Gorton (R-Wash.) called Frank Zappa's testimony "boorish, incredibly and insensibly insulting" and said Zappa "could manage to give the First Amendment...a bad name."



Overzealous music-industry watchdogs stuck Frank Zappa's entirely instrumental *Jazz in Hell* album with a "parental advisory" label.

Though Chairman John Danforth (R-Mo.) claimed there was "zero chance of legislation," the music industry could be forgiven for having doubts: Sen. Don Riegle (D-Mich.) warned the RIAA to rate records "before somebody else tries to do it for you," and Sen. James Exon (D-Neb.) noted he'd be interested in legislation "unless the industry cleans up its act." Sen. Paula Hawkins (R-Fla.) believed "no one has the right to poison our children with these lyrics," and the always entertaining Sen. Hollings stated the music in question was "outrageous filth." "We've got to do something about it," he said, adding that he had the "best constitutional minds" checking to see if it could be outlawed.

Directly after the hearings, Tipper Gore claimed, "We don't want to restrict artistic expression," but her cause was catnip to governmental censors. Soon, many states introduced legislation, often blatantly unconstitutional, to limit or label rock music. Although the laws didn't stick, their implications remain. Today, rack jobbers like Wal-Mart and Kmart refuse to sell albums with warning stickers or other music thought dubious. Many record stores won't sell stickered albums to minors and won't openly display anything deemed too outrageous. Some chains, including Camelot, Harmony House, and Moby Disc, have simply decided not to sell music considered too hot to handle.

WHETHER QUASI-GOVERNMENTAL RESTRICTIONS similar to the ones foisted on movies, comics, and records will be imposed on TV programming remains to be seen. Canada, seen by many as a worthy model for health-care reform, may also play an inspirational role in proposals to overhaul TV shows. The Canadian equivalent of the Federal Communications Commission, the Canadian Radio-Television and Telecommunications Commission, recently approved a "voluntary" production code put together by the Canadian Association of Broadcasters, a private industry group threatened with possible government censorship.

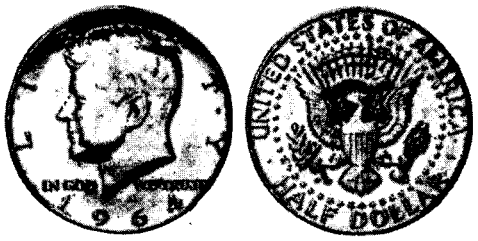
Among other things, the code limits the broadcasting of "violent" programming to between 9 p.m. and 6 a.m., restricts "violence based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age or mental or physical disability," and decrees that, in children's programming, "violence shall only be portrayed when it is essential to the development of character and plot." (How the code will affect the broadcasting of programs and movies critical of, say, racially motivated violence is unclear.) *The Washington Post* reported that, "while compliance with the code is officially voluntary, the CRTC said it will make 'compliance with the code a condition of license for all privately owned television stations and networks when renewing their licenses.'"

We've seen *this* drama before, the one in which government officials make a group an offer they can't refuse. But unlike quality programming, nothing is gained from a second viewing. The reformers claim they're on the side of morality while their opponents only care about money. They trot out the three *G*s: Whatever they don't like is glorified, glamorized, and gratuitous. They're not extremists, they say; they merely represent a sensible balancing of interests. Above all, they will never, ever admit they're censors. ®

Steve Kurtz is a writer living in Los Angeles.

GREG GORMAN

Silver Coin Breakthrough!



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As a result, the 1964 Kennedy half dollars are much scarcer than their mintages indicate.

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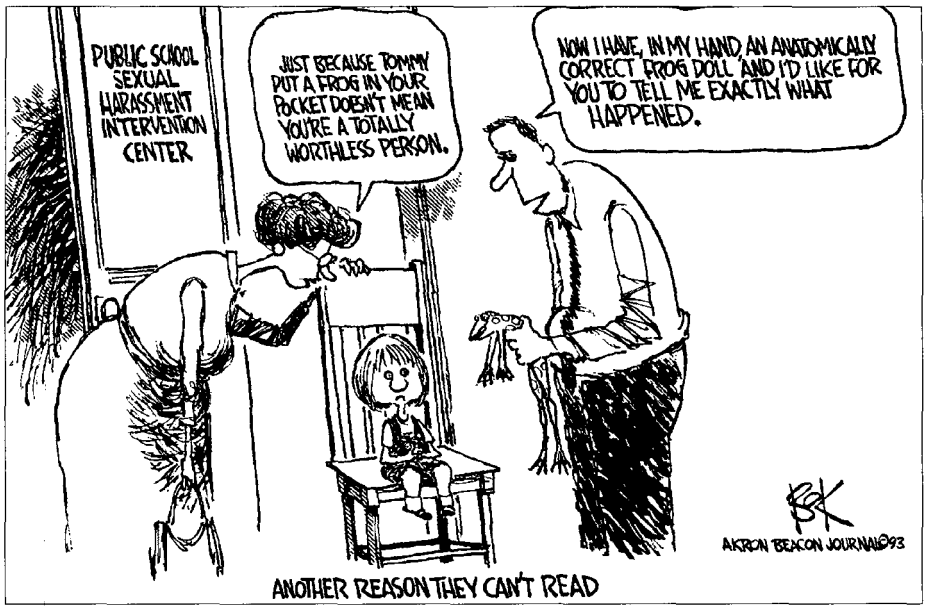
A Reasonable Woman

By Tama Starr

An open letter about how to stay on the right side of sexual-harassment law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AKRON BEACON JOURNAL©93
ANOTHER REASON THEY CAN'T READ

DEAR COMRADE [ACCORDING TO *The Bias-Free Word Finder: Dictionary of Nondiscriminatory Language,* the word *fellow* is no longer acceptable] Small-Business Owner:

The old Russian proverb, "A woman is not a person as a chicken is not a bird," is now enshrined in civil-rights law. Although the U.S. Supreme Court's recent unanimous decision in *Harris v. Forklift,* which lowered the standard of proof in sexual-harassment cases, did not specifically address it, the "reasonable woman" standard is snaking its way through our courts, legislatures, and administrative agencies.

A 1991 ruling by the U.S. Court of Appeals for the Ninth Circuit, *Ellison v. Brady,* held that determination of whether behavior or speech constitutes sexual harassment should be based on how a "reasonable woman" would perceive it. Previously the standard had been a "reasonable person." A federal district court in Florida immediately adopted the "reasonable woman" standard; it is now being applied in New York by the city's Commission on Human Rights and in a host of other jurisdictions. Stephen Bokat, vice president and general counsel of the U.S. Chamber of Commerce, predicts that the "reasonable woman" standard will eventually be applied nationwide.

Failure to understand and comply with the "reasonable woman" standard may cause you to kiss (excuse the expression) your business goodbye. Under the 1991 Civil Rights Act, penalties for sexual harassment in the workplace include punitive damages of up to $300,000 per incident (a ceiling Sen. Ted Kennedy, the great defender of womanhood, has vowed to raise to $1 million). This penalty applies if any of your employees brings a complaint against you or a co-worker—or against any of your suppliers, customers, or consultants; your lawyers, accountants, or union representatives; your insurance brokers, artists, or engineers; visiting photographers or journalists; building inspectors, sanitation workers, police or fire officials; bystanders at your job sites; or the homeless who scavenge your trash for recyclables. Under EEOC guidelines on employer accountability, you are now liable for the conscious and unconscious behavior of each of these individuals to the degree it may affect the sensitive psychological environment in your workplace.

You will recall that the standard for the successful prosecution of a harassment complaint is the victim's *perception* of having been subjected to hostile or unfriendly speech, behavior, or attitudes anywhere within our purview or that of our forepersons and supervisors. As Justice Sandra Day O'Connor wrote in *Harris v. Forklift*: "So long as the environment...is perceived as hostile or abusive, there is no need for it also to be psychologically injurious." Not that this opinion was itself without controversy. Though women's legal groups unanimously praised the ruling, a number of them had filed briefs arguing that sexual-harassment complainants should not be required to show that the conduct that offended them would also offend *either* a "reasonable person" *or* a "reasonable woman." So we have not heard the end of the argument against reasonableness per se.

But so far, the concept of reasonableness remains in place, and we must scrutinize the entrails of these standards so that, through profounder comprehension, we may formulate correct policy and emerge blameproof. What, we may wonder, is the exact difference between a "reasonable woman" and a "reasonable person"? Understanding this distinction may be the key to our survival.

Transcending the vexing question of whether a woman is or is not a person, let us cut to the heart of the matter and ask whether there is or can be such a creature as a "reasonable woman," or whether in-

CHIP BOK

deed there should be. Is not the very concept of reasonableness a patriarchal conceit? Does it not represent the hierarchical imposition of left-brain values, an exaltation of the emotionally disordered male "logic" that has created warfare, rapism, poverty, disease, and immeasurable pain and suffering throughout history? As a woman, I take offense at the imputation of "reasonableness." Perhaps I should sue.

UNTIL I MAKE NEW LAW ESTABLISHING my personal criteria of unreasonableism, business owners have to grapple with the question of what the courts might have had in their brains when they established the "reasonable woman" standard. Since the only characteristic that absolutely distinguishes a woman from a genderless "person" is the fact of her sex, we have to infer that a woman's reasonableness is fused to her physiology. So the onset of female puberty must be the indicator of reasonableness. Shall we conclude, then, that business owners should formulate their human-resource policies according to the needs and perceptions of 12-year-old girls? (Having once been a 12-year-old girl, I must say that might not be such a bad idea.)

Or do women achieve their "reasonableness" at the other end of the sexual maturity cycle, the climacteric? Reasonableness would then require that all workplace thermostats be set at 52 (or the average age of those present). Overheated rooms are definitely a form of harassment.

Or is the menstrual cycle itself the signifier of female reasonableness? Do our courts and legislators intend that businesses be run on a lunar cycle, with preordained times for mass edema, irritability, and ovulation? At the appropriate points in the cycle, the company could issue its sales figures, engage in disputes, or announce a merger or spinoff. (Infusions of estrogen into the water cooler should solve the nonconformity problem.)

What other solutions might there be to the predicament we find ourselves in? One answer would be simply not to hire women, who are a hundred times more likely than men to bring sexual-harassment suits. While that may be the unintended consequence, or even the hidden intention, of the new codes, many of us would find that response unacceptable.

Another solution might be to require all employees, suppliers, customers, and service providers to submit all proposed remarks in writing for before-utterance preview (BUP). A special department would be instituted in every company to process these "utterance requests" (U.R.s), thus alleviating unemployment. Unfortunately, this system would not solve the problem of offensive gestures, looks, attitudes, etc., which are also covered by the codes.

Technology offers the most practical answer. A universal computer network, with every operator in an individual air-conditioned cell, would not only achieve the desirable end of physically separating the sexes, it would isolate all potential harassers (everybody) from all potential victims (everybody else). While this system would also accelerate the decline of our cities and cost hundreds of billions of dollars, it would be worth it. In a world where, according to American Management Association guidelines, "unreasonable conduct" includes "condescension... [and] exclusion (overlooking or denying someone access to places, people, or information)," and "unwelcome behavior" is defined as any "conduct that the employee did not solicit or incite and that the employee regards as undesirable" ("Hate your necktie!"), the punitive potential against maintainers of "abusive working environments" is vast. The network I envision would be programmed to automatically screen out all potentially offensive language, behavior, and thought. Eventually it will be possible for communication to take place without any human intervention at all. ®

Tama Starr is president of the Artkraft Strauss Sign Corp. in New York City and the author of The "Natural Inferiority" of Women: Outrageous Pronouncements by Misguided Males. *She is currently working on a book satirizing feminist excesses for Harcourt Brace.*

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The Dead Zone

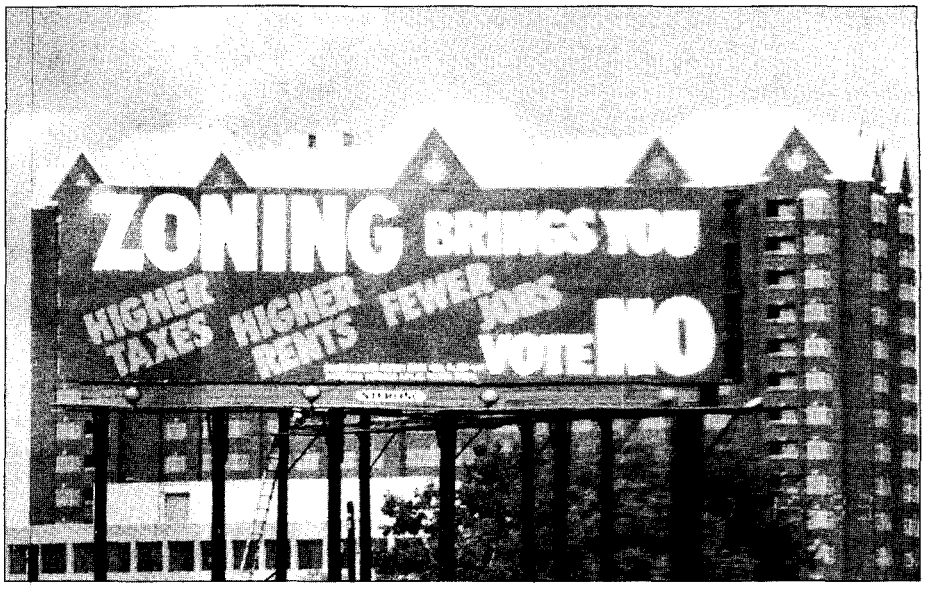
By Kevin M. Southwick

Houston residents take a stand by refusing to draw lines.

UNTIL ONE MONTH BEFORE LAST November's election, things looked rock-solid for backers of a proposed zoning ordinance in Houston. The bill—which, if passed, would have been the first law of its kind in the city's history—was supported by the current mayor, his predecessor, every member of the City Council, 160 homeowner organizations, and the *Houston Post*.

Although zoning measures had been turned down handily in 1948 and 1962, this time around promised to be different. Zoning proponents had become increasingly vocal and persuasive since the city's boom years in the late 1970s and early '80s. In the wake of the '80s oil bust, the arguments trounced in 1962 found a new constituency ready to believe zoning would control growth and offer protection from "undesirable" development. Supporters of zoning promised it would protect property values and reverse the exodus to bedroom communities outside the city. By 1990, one poll showed that 67 percent of Houston residents supported zoning. Everything was in place for the triumphant passage of zoning legislation.

Everything, it turned out, except the necessary votes. In a city-wide referendum, Houston residents once again rejected zoning, by a 53-to-47 percent margin. "Houston remains a model for city leaders around the country who wish to learn how cities can be better off without zoning," says Barry Klein, a public-policy consultant who co-founded the Houston Property Rights Association, the grassroots anti-zoning organization spearheading the opposition to zoning (where I serve as media director).



As interesting as Houston voters' rejection of zoning is where the decisive opposition came from: low-income residents. The *Post* reported that 72 percent of "low-income blacks" voted against zoning.

As interesting as the voters' rejection of zoning is where the decisive opposition came from: low-income residents. As tabulated by the *Post*, 72 percent of "low-income blacks" and 68 percent of "low-mid-income whites" voted against zoning, results echoed by "affluent" voters (56 percent against) and "predominantly Hispanic" voters (58 percent). Middle-income voters, fearful of multi-family dwellings and mixed land-use encroachment in residential neighborhoods, strongly favored zoning, with 63 percent of whites and 56 percent of blacks casting ballots in favor of the legislation.

Houston, the fourth-largest city in the country, with 1.6 million residents, has no zoning ordinance. All property owners must adhere to 18 land-use ordinances, largely dealing with issues of health and safety, and most homeowners are bound by additional private restrictions written into their deeds. Owners of private residences, for instance, might be obligated not to use their property for commercial purposes or multi-family dwellings; they might be forbidden to make exterior alterations such as the installation of satellite dishes. Deed restrictions are enforced by the city.

The recently defeated legislation was largely the work of City Councilman Jim Greenwood, a longtime zoning advocate. Greenwood has endorsed other land-use regulations, such as the eventual elimination of billboards and an ordinance requiring developers to plant trees and shrubs. In 1990 Greenwood formed a committee that created a simplified plan it dubbed "Houston-style" zoning. The committee called for the City Council to draft a comprehensive plan for the Houston area, and then-Mayor Kathy Whitmire, sensing a hot-button issue, formed her own land-use group, the Land Use Strategy Committee. The LUSC ultimately recommended beefing up the city's deed-restriction enforcement and creating "neighborhood protection teams" to help accomplish the policing. Zoning, Whitmire's committee concluded, was too difficult and costly and should be considered only as a last resort.

HOUSTON PROPERTY RIGHTS ASSOCIATION

But the push for zoning continued. Zoning advocates were able to get the city and the local chapter of the American Institute of Architects to cosponsor a committee of land-use experts from around the country, the Regional/Urban Design Assistance Team. R/UDAT included people that many thought likely to go along with zoning. The obvious exception was Bernard Siegan, author of the 1972 classic study *Land Use Without Zoning*. After public discussions, R/UDAT concluded in April 1990 that "comprehensive land-use planning" was "inappropriate given Houston's history and the difficulty and time required to implement a single comprehensive plan in a community of this scale and diversity."

ALTHOUGH ZONING ADVOCATES WERE surprised by the committee's conclusions, they persisted. In January 1991, Whitmire, alongside Greenwood, endorsed zoning in a joint press conference. Eventually they won a unanimous vote from the City Council to have a zoning ordinance drafted. The council formed the Zoning Strategies Committee, which drafted a plan with limited-use classifications. The main difference between "Houston-style" planning and traditional zoning schemes was that the committee defined all large tracts as "open" rather than "agricultural." Greenwood argued that the "O-zone" would save landowners the frustration of seeking zoning changes for residential or commercial development.

Zoning garnered support from important players. Many homeowner associations signed on, as did several large developers. Reporters for Houston's two daily newspapers, the *Post* and the *Chronicle* used pro-zoning rhetoric in their coverage. On January 5, 1991, for example, a *Chronicle* reporter lamented the city's "helter-skelter growth" and praised efforts "to keep commercial and industrial eyesores out of residential neighborhoods." The *Post* followed suit the next day, noting that Whitmire's "announcement marks a major shift in city leaders' vision for the future development

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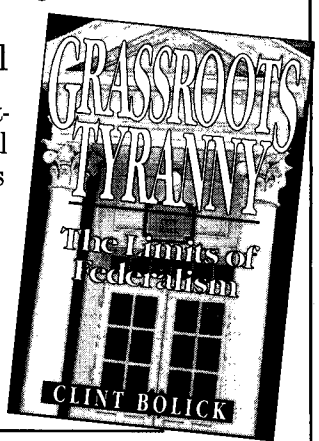

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of Houston, a metropolis known for its sprawling growth made possible by a lack of zoning restrictions now found in every other major city in the country."

Early opposition to the zoning ordinance was organized largely by Klein and Meredith James, a veteran of the successful 1948 and 1962 anti-zoning campaigns. In early 1993, they founded the Houston Property Rights Association and began a petition drive to amend the city's charter to require a referendum on any proposed land-use ordinance and a six-month period of public review of any such ordinance. Because the charter doesn't require a public referendum to adopt a zoning plan, the City Council could have approved one at any time. But as the council prepared to do so, the HPRA had already collected thousands of signatures. Since most council members were sure the public favored zoning, they put the issue on the November 2, 1993, ballot and scheduled the referendum on the charter amendment for January 15, 1994.

For intellectual firepower, the HPRA drew on anti-zoning sources such as the Jack Kemp-era Housing and Urban Development study *Not in My Back Yard*, which linked land-use restrictions to higher housing costs, and Siegan's *Land Use Without Zoning*, which concluded that "zoning has been a failure and should be eliminated." Siegan, a professor at the University of San Diego Law School, argued that the patterns of land use in Chicago and Houston were similar, except that Chicago had graft and higher housing costs due to regulation.

The HPRA was joined in the summer by a second anti-zoning organization, Citizens for a Better Houston, founded by City Planning Commissioner Julio Laguarta. Laguarta was one of the people responsible for drafting the zoning ordinance, so his renunciation of the plan carried particular weight. Upset that the "final ordinance" was "pounded out" in a series of unannounced private meetings between civic leaders and pro-zoning developers, Laguarta said there "huge errors" and "hundreds of problems" with the document. Laguarta's group, representing the wealthier "River Oaks" crowd, was less against zoning in principle and more against the way in which the plan under consideration had been developed.

Despite philosophical differences, the HPRA and CBH coordinated outreach efforts. CBH spent close to $500,000 to fight the plan and concentrated its resources on TV ads, including one criticizing the City Council for trying to adopt zoning without a comprehensive plan for infrastructure development in the greater Houston area. The HPRA, which raised $190,000, maintained a team of debaters who made over 100 appearances, distributed thousands of brochures and newsletters, aired radio ads stressing zoning inspectors' powers to enter and inspect homes and businesses, and broadened the anti-zoning coalition by reaching out to minority organizations.

"We do not want Houston to become another Dallas, Detroit, Washington, D.C., Chicago or St. Louis," said the Baptist Ministers' Association. "These are all zoned cities (with) slums *much* worse than Houston."

THE MOST IMPORTANT MINORITY ORGANIzation was the Baptist Ministers' Association, a 100-year-old group of black religious leaders. In September 1991, it announced its opposition to the ordinance, largely due to fears of zoning-based restrictions on church activities. "Zoning controls when and where churches may build or expand on their own property," the group said at a press conference. "We know that certain kinds of church activities can be prohibited under zoning such as 'accessory uses' which, in zoned cities, are not protected by the first amendment but are protected in unzoned Houston by property rights." (See "Quiet Crusade," December 1987.)

The ministers also stressed issues of economic empowerment, noting that, historically, zoning has been "used against minorities and the poor" and has hurt the growth of multi-ethnic businesses. The commercial daytime activity created by mixed land use, argued the ministers, deters crime and helps to build community by maximizing jobs, goods, and services in a given neighborhood. This real-world understanding of land-use planning, coupled with the suspicion that they would be left out of ongoing zoning decisions, explains the overwhelming anti-zoning vote by low-income residents.

The ministers' official position statement, which the HPRA's Klein had a hand in drafting, dramatized the case against zoning: "Zoning will restrict churches and kill jobs in the black community; zoning will segregate minorities; zoning will raise rents and taxes; zoning will kill redevelopment and zoning will breed slums. We do not want Houston to become another Dallas, Detroit, Washington, D.C., Chicago or St. Louis. These are all zoned cities. They all have areas of poverty and slums *much* worse than Houston." Attempts by supporters of zoning to link the association's stance to a $6,000 payment made by the HPRA to defray campaign costs backfired, galvanizing black voters against the proposed legislation.

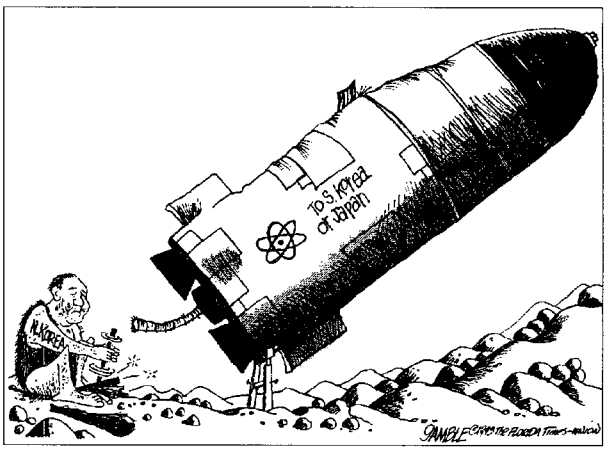
Houston's defeat of zoning was achieved by assembling an unusual coalition of liberals, conservatives, blacks, whites, and Hispanics. It proved that voters are suspicious of huge new bureaucracies, especially when they understand the impact on their property and livelihoods. While other cities seem reconciled to zoning and centralized land-use controls, Houston continues to buck the trend. Says Klein: "We have preserved the soul of Houston, which shall remain a beacon of freedom to citizens in other large cities."

Kevin M. Southwick, editor of the Houston Agenda, *is the media director for the Houston Property Rights Association. He served as research and media director for former U.S. Rep. Ron Paul of Houston.*

Going Anti-Ballistic

By Michael R. Boldrick

The Clinton administration shoots down national missile defense.



ED GAMBLE

LISTEN TO ABUL ABBAS, MASTER-MIND behind the 1985 *Achille Lauro* hijacking: "Revenge takes 40 years; if not my son, then the son of my son will kill you. Some day, we will have missiles that can reach New York."

Only a few years ago, such a boast would have been dismissed as the lunatic fantasy of a self-aggrandizing terrorist. That is no longer the case. During his confirmation hearings, President Clinton's CIA director, R. James Woolsey Jr., told the Senate Government Affairs Committee that long-range missiles capable of attacking U.S. cities will be available on the international arms market by the end of this decade. China is currently developing three new intercontinental ballistic missiles and already hawks to Third World governments smaller missiles like the CSS-2, which has a range in excess of 1,500 miles. North Korea produced some of the Scuds used by Iraq during the Persian Gulf War. More recently, it has developed the No Dong 1, a medium-range missile capable of carrying nuclear warheads, and has shown little interest in curbing the development (and presumably, deployment) of nuclear weapons. The current scenario is as chilling as any during the Cold War because the most likely targets of limited strikes by outlaw nations or terrorist groups are population centers, not military bases.

This harsh new reality makes the Clinton administration's dismissive approach to anti-missile missile systems indefensible. Under the administration's strategy, cities such as Tel Aviv, Seoul, and Riyadh will get U.S. technology to protect their citizens from ballistic missile warheads, while New York, Washington, and Los Angeles will not. This radical change in U.S. defense posture is the result of a one-two punch delivered by then-Secretary of Defense Les Aspin and Rep. Frank McCloskey (D-Ind.), who sits on the House Armed Services Committee.

ASPIN DOWNGRADED U.S. TERRITORIAL defense when he canceled Star Wars and replaced it with a less ambitious program called the Ballistic Missile Defense Organization. The BMDO will first go after short-range missiles like the Scuds fired at Saudi Arabia and Israel during the Gulf War. Defense of U.S. borders, which was the primary objective of former President Ronald Reagan's 11-year-old Strategic Defense Initiative, was relegated to second place.

In an apparently coordinated move, McCloskey served as the administration's point man in putting national missile defense on indefinite hold. During the 1994 defense authorization, McCloskey introduced an amendment to the three-year-old Missile Defense Act that effectively cancels efforts to use interceptor missiles to defend U.S. population centers.

Congress passed the Missile Defense Act after a 1991 weapons test in the mid-Pacific demonstrated a unique U.S. capability to destroy missile warheads using the kinetic energy of a deliberate collision rather than the detonation of high explosives. During a simulated terrorist attack against a population center, an SDI-developed ground-based interceptor shot down a dummy Minuteman warhead traveling at 22 times the speed of sound. In essence, a bullet hit a bullet at 300,000 feet.

The act authorized limited deployment of defensive missiles along the Canadian border near Grand Forks, North Dakota. The modest system Congress envisioned two years ago would protect the U.S. population centers from accidental or terrorist missile attacks rather than a massive first strike reminiscent of the Cold War era. By approving the system, Congress acknowledged the threat implicit in a new world order in which nuclear-capable missiles would be widely available.

When McCloskey changed the act's operative phrase from "develop" to "conduct...research," he derailed national missile defense. If the Missile Defense Act is not scrapped outright by the amendment, advocates of arms control stand ready to bury the ground-based interceptors under enough restrictions to make them incapable of defending major population centers.

Few defense analysts oppose defending overseas military bases and cities from the growing menace of short-range ballistic missiles. If the United States can't protect its allies against nuclear bombardment, foreign governments could easily be intimidated into denying access to airfields and harbors during a crisis. The Gulf War demonstrated the viability of anti-missile missile systems and, although original Army claims that 45 of 47 Patriot interceptors fired at Scuds hit their targets were later scaled back (and only 40 percent of Patriots deployed in Israel were

effective), it's clear that the system, originally intended as a long-range aircraft interceptor, worked in principle.

In fact, the BMDO plans to use similar technologies developed by SDI to upgrade short-range missile defense. Stereo processing and super-fast computers will give the edge to Patriot and Aegis rockets, also used during the Gulf War, in any future engagement with the short-range missiles now proliferating in the Third World. But what is good enough for overseas is not good enough for over here. Neither system has the punch to knock out long-range missiles capable of striking U.S. cities from overseas launch points.

For the Clinton administration and the Democratic leadership in Congress, however, adherence to 23-year-old Anti-Ballistic Missile Treaty signed between the United States and the defunct Soviet Union is more of a priority than defending U.S. population centers. The 1972 treaty, which was designed to prevent a massive nuclear first strike by either superpower, limits U.S. missile defenses to the single North Dakota site. While that remote location is ideal for defending strategic bomber and missile bases located in the Great Plains—the presumed first targets in a "mutual assured destruction" scenario—it's clear that a massive attack from the former Soviet Union's four nuclear republics is not likely. The North Dakota site, however, is outdated in a more serious way: It's too far inland to efficiently protect population centers along our East and West coasts.

The North Dakota site could easily be updated with SDI-based technology. By using the "Brilliant Eyes" satellite warning system, which is not in any way a weapon, the Grand Forks–based interceptors will have enough reaction time to fly halfway across the continent and smash a warhead before it can level New York's Twin Towers. In fact, SDI's space-based alarm system would give Grand Forks more than enough time to fire *two* interceptors against an attacking warhead, assuring an even-higher probability of kill.

But under the 1972 rules, as interpreted by the Clinton administration, the United States can't maintain a missile defense system that protects its citizens from looming post–Cold War threats. According to the strict interpretation of the ABM treaty favored by Sen. Sam Nunn (D-Ga.), powerful chairman of the Senate Armed Services Committee, Rep. Ronald Dellums (D-Calif.), chairman of the House Armed Services Committee, McCloskey, and the Clinton administration, we can protect only bomber and missile bases, or nothing at all. So, they argue, why spend the money?

U.S. defense capabilities have hardly changed since Reagan first proposed Star Wars. What *has* changed is the availability of weapons of mass destruction and the means to deliver them.

ALTHOUGH THE SDI TECHNOLOGIES OF the 1980s and '90s weren't even hypothetical possibilities when President Richard M. Nixon signed the ABM treaty in Moscow, the strict interpreters won't consider deploying missile defense systems designed to protect civilian populations. Their logic is convoluted: Since the ABM treaty doesn't specifically mention space-based sensors, they must be prohibited. To them, time and technology were frozen forever in Moscow in 1972. They prefer an outdated, ineffective system geared to a threat that is currently dormant, or none at all.

Thomas Graham, acting director of the Arms Control and Disarmament Agency, summarized the Clinton administration's assessment of the ABM Treaty in a July 14 letter to Senate Foreign Relations Chairman Claiborne Pell (D-R.I.). Graham wrote, "It is the position of the Clinton administration that the 'narrow' or 'traditional' interpretation of the ABM Treaty is the correct interpretation and therefore that the ABM Treaty prohibits the development, testing, and deployment of sea-based, air-based, space-based and mobile land-based ABM systems and components without regard to the technology utilized." This is to say that no meaningful missile defense system will come to pass. SDI's last director, Maj. Gen. Malcolm O'Neill, said it's impossible to develop an effective national missile defense without using space-based assets.

The "narrow" interpretation of the ABM Treaty, however, doesn't take into account that the Russians never said space-based warning and queuing systems would violate the agreement. The Clinton administration, taking a page from the diplomatic playbook of the Bush administration, has steadfastly refused to request a clarification from the Russians or even attempt to re-negotiate the treaty. The other option, abrogating the outdated ABM Treaty in the interests of U.S. citizens and national defense, can't even be whispered in Washington.

This latter option would best serve national defense interests. By completely discarding an outdated icon of the Cold War, the United States could deploy the defense best suited to emerging Third World threats. We could scuttle the North Dakota site and locate missile interceptors near East Coast cities, the most likely targets of Middle Eastern terrorist nations. This would greatly increase reaction time, giving the interceptors the optimal advantage against inbound missile warheads.

Ten years and $38 billion after Reagar promised to render nuclear missiles "impotent and obsolete," little has changed in terms of American defense capabilities. Although it now has the capacity to do so, the United States is no closer to fielding an effective national missile defense than it was when Star Wars was conceived. What *has* changed over the last decade, and what will continue to grow into the 21st century, is the availability of weapons of mass destruction and the means to deliver them.

Michael R. Boldrick is a retired Air Force colonel who writes on arms-control and strategic-warfare issues.

Whistle While You Work

By Martin Morse Wooster

How to succeed in business without really crying.

UNTIL RECENTLY, MOST MANAGEment experts were in rough agreement about what the role of the worker in the American corporation was to be. In the 1940s, Peter Drucker taught in *The Concept of the Corporation* that the large American business, by offering generous benefits in exchange for a lifetime of work, would act as a private welfare state and ensure that America would never suffer from central planning or social democracy. In the '50s, John Kenneth Galbraith's *The Affluent Society* assured Americans that big business would use advertising to steadily seduce the masses into buying its products, thus ensuring rising profits, increased market share, and happiness for its workers.

This conventional wisdom has now been turned on its head. The optimism of the '50s has now been replaced by fashionable gloom. The workplace used to be thought of as the road to happiness; it's now seen by far too many pundits as the gateway to hell. Our parents spent 40 years toiling for a large business in return for a nice house in the suburbs and a generous pension; the baby boomers and busters will be lucky if their boss smiles before tossing them out on the street. Even if you manage to survive in your job, you'll have to do battle with your colleagues, some of whom may follow the management philosophies of the Marines, Joseph Stalin, or Attila the Hun. And in every large enterprise, there's always the mysterious man with a big black hood and an industrial vacuum cleaner, who sucks up your job and spits it out in Mexico or the Far East.

Some observers have even doubted that Americans know what it means to be middle class anymore. Our old notions of middle-class jobs, observes New School for Social Research sociologist Alan Wolfe in the Summer *Wilson Quarterly*, are "increasingly obsolete: yeoman farmer, small-town merchant, independent entrepreneur, male breadwinner, stay-at-home mom, hard-working school teacher, self-employed lawyer, family physician." Is Zoë Baird, with her $500,000 salary, in the middle class? How about an executive who's living on his wife's income while starting a new business? How about a Korean grocer? Or "an assistant professor of anything"?

Changing Times: Our parents spent years working in return for a house in the suburbs and a generous pension. Baby boomers will be lucky if their boss smiles before tossing them out on the street.

SUPERSTOCK

Even the wealthy, notes Houghton Mifflin editor Richard Todd in the September *Worth*, are racked with insecurity and doubt. The confident, heroic entrepreneurs of the 19th century built grand homes that, when converted to museums, still delight Americans nearly a century after they were constructed. After they built their fortunes, they retired to lives of pleasure, leisure, and philanthropy. But now the rich aren't the leisure class; they're the frenzied class. Microsoft's Bill Gates, the modern equivalent of a Carnegie, Ford, or Rockefeller, has built a house mostly made up of tunnels, where he can hide from the world and spend his spare hours gazing at his "collection" of 100,000 paintings. Gates doesn't even *own* these paintings; he just bought the electronic rights so he can broadcast them on huge high-definition television screens. (And, presumably, incorporate them into multi-media software packages.)

"Stress, not bountiful ease, seems to be the lifestyle lesson that the upper-class models for the rest of the society," Todd writes. "Busy-ness is becoming our liturgy, if not our national religion." This is particularly true in Hollywood; Todd reports that the most fashionable accessory for the wealthy actor is a political consultant, who recites the latest gossip while a personal trainer makes her sweat.

All this activity, Yale emeritus professor Robert E. Lane notes in the Fall *Public Interest*, is unlikely to result in happiness. Most "quality of life" surveys, says Lane, report that people usually say they are happiest with (in order of preference) a strong family, close friends, and an enjoyable job. But there's no correlation between income levels and pleasure in the workplace: Lane recalls talking to a wallpaper hanger "who found his skill in handling corners a source of great delight."

Moreover, says Lane, relying on money as the measure of happiness might cause you to step onto what psychologists call the "hedonic treadmill," where you feel you would be happier if your income increased by 25 percent. Apartment renters would like to be able to get a house, homeowners want a larger house and a second car, and, if you're as wealthy as

lawyer Arnold Becker on *L.A. Law*, you want a top-of-the-line Bentley. (If you're as *smart* as Becker, you'll have a happy client *give* you a Bentley.) Once you're on the hedonic treadmill, says Lane, it's very hard to get off, since it never ensures happiness; whatever you earn, you'll always want 25 percent more money. Lane suggests that a better way to live is to realize that "families and friends and a fulfilling job are the true path to happiness."

IF YOU DO INSIST ON TRYING TO BEAT THE treadmill, don't think that having paid attention in school will help your effort. As the *San Francisco Chronicle*'s Jonathan Marshall notes in the September *Mother Jones*, the connection between academic excellence and good wages is very weak. Economists at Harvard and MIT, Marshall reports, recently studied male 1980 high-school graduates who scored at the 84th percentile on a standard test of math skills. Six years after they graduated, these superior students earned only 60 cents more per hour than average students and earned *less* than 1972 graduates at the 50th percentile with compatible experience. "The notion that only fixing up skills will solve our problems is wrong," Harvard education professor Richard Murnane tells Marshall. "It won't solve the productivity problem or the low-wage problem."

What will improve American productivity, Marshall suggests, is for corporations to abandon traditional command-and-control management practices and devolve power as much as possible. The NUMMI joint venture between Toyota and General Motors, Marshall contends, is a highly productive enterprise not because of mysterious Asian practices but because the company allows workers to make decisions formerly handed down by management. When "forward-looking employers in high-tech fields" need workers to learn technical skills, Marshall argues, they should offer high wages and a less restrictive corporate culture—incentives that will do more to persuade workers to acquire new skills than any government program or subsidy.

But a flattened hierarchy means that the traditional goal of climbing the corporate ladder will no longer be desirable for many Americans. In the September 6 *Fortune*, Jaclyn Fierman notes that "in today's less vertical corporate world," many workers won't move closer to the executive suite with every promotion; they may move sideways, head for an exit, or even move down to a job "that may carry more weight but promises more growth."

Relying on money as the measure of happiness leads to the "hedonic treadmill," where you feel you'll be happier if your income increases by 25 percent. Once you're on the hedonic treadmill, it's very hard to get off, since it never ensures happiness; whatever you earn, you'll always want 25 percent more money.

FIERMAN PROVIDES SEVERAL SHORT profiles of workers who fled frustrating jobs for happier ones. In most cases, workers trusted their instincts in finding a new trade. Roger Proscio, for example, had wanted to be a writer since he was 12 but instead ended up working for a consortium of Miami banks that applied for government grants for low-income housing. Though he made $81,000 a year, had a big condo and season tickets to the opera, Proscio gulped antacids at the office and felt miserable. But after telling his troubles to one of his boss's advisers, who happened to be the CEO of Knight-Ridder, Proscio eventually became an editorial writer for the *Miami Herald*, where he makes half his old salary but is quite happy.

An anonymous petroleum geologist told Fierman that she had to fire half of the people she supervised and, given low oil prices, would probably get fired herself. But she told Fierman that she was resigned to changing her job. "I decided if I get laid off, so be it. If my husband and I have to sell our house, it won't be the end of the world. There is something very freeing about letting go of these fears."

This woman's attitude is the right way to face an insecure corporate workplace. Bill Clinton, Hillary Clinton, and Robert Reich are doing what they can to persuade the voter that, somehow, Washington will give them better jobs and nicer bosses. But job-training programs have been a bipartisan boondoggle for decades. Given the history of the CETA and JTPA programs in the Carter and Reagan administrations, it is likely that a new job-training program will end up rewarding well-connected businessmen and major contributors to the Democratic Party and do very little to help the average worker.

America's workers will be happier and more productive if they relearn the virtues their parents and grandparents knew. The person who does what he loves at a low wage is far more admirable than the person who trades days full of hate for a high income. Self-reliance is better than dependence; saving increases independence, while debt ultimately enslaves you; and the best pleasures in life don't depend on money. But the most important lesson of all is that you are more responsible for your fate than the government is. Solving your own problems in the workplace is a far better way to live than depending on a bureaucrat to save you from ruin and despair.

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Rancorous Liaisons

By Cathy Young

The Morning After: Sex, Fear, and Feminism on Campus, by Katie Roiphe, Boston: Little, Brown, 153 pages, $18.95

Only Words, by Catharine MacKinnon, Cambridge, Mass.: Harvard University Press, 152 pages, $14.95

Sexual Violence: Our War Against Rape, by Linda Fairstein, New York: William Morrow & Co., 288 pages, $23.00

Sex Crimes, by Alice Vachss, New York: Random House, 285 pages, $21.00

FOR ALL THE TALK OF ANTI-FEMINIST backlash, the truth is that, in the '80s and early '90s, the radical feminist party line on date rape and sexual harassment was virtually unchallenged in the media. (For the record, REASON was the first to call attention to the campus date-rape hysteria, in July 1990.) Now revisionism is suddenly respectable to the point where the debate over a new "sexual correctness" blighting the love lives of Americans has made the cover of *Newsweek*. The change is probably due to the convergence of two events: news stories about the self-parodying sexual-offense code at Antioch College (which requires explicit consent at each new level of intimacy) and the publication of Katie Roiphe's provocative, irreverent book *The Morning After: Sex, Fear, and Feminism on Campus*.

Roiphe, a 25-year-old doctoral candidate at Princeton and the daughter of noted feminist writer Anne Roiphe, was in an unusually good position to write this book—not only because of her belly-of-the-beast vantage point but because her pedigree makes it more difficult to smear her as a part of the "backlash."

JERRY BAUER

Katie Roiphe

Roiphe wants to reserve the label of rape for acts involving the use or threat of force; that this is considered "controversial" brings to mind George Orwell's remark that in certain times the duty of every decent person is the restatement of the obvious.

The Morning After has its weaknesses, a paucity of research above all. When Roiphe challenges the common statistic that one in four college women is the victim of rape or attempted rape, she reflects, "If I was really standing in the middle of an 'epidemic'...if 25 percent of my female friends were really being raped, wouldn't I know it?" Intuitively, this makes sense, but it is an argument that, when not backed by alternative statistics (which do exist), is vulnerable to attack. Nor does Roiphe cite any actual incidents of alleged date rape hinging on miscommunication or "psychological coercion" (except for a sketchy account of a New Jersey court case that did not involve students).

But then, Roiphe herself explicitly states that she did not set out to write "a comprehensive, encyclopedic sociological analysis." Rather, *The Morning After* is a very personal look at campus sexual politics: "I have written what I see, limited, personal, but entirely real." What she sees, through the eyes of one who grew up with feminism as a celebration of female strength, is a new rhetoric that wallows in female victimization, depicting women as passive, childlike creatures who need to be protected.

And she does cite plenty of evidence that her concerns are not groundless—such as official pamphlets advising new women students, "Since you can't tell who has the potential for rape by simply looking, be on your guard with every man," and warning men to obtain "a clear sober 'yes'" to make sure they're not committing rape. Campus literature and workshops define "verbal coercion" into having sex—by arguments such as "everyone's doing it"—as a form of date rape, and "unwanted sexual comments, jokes or gestures" as "a form of sexual assault."

While this chilly environment has not snuffed out sex, its effects are visible. At a party, two sophomores discuss the dangers of acquaintance rape: "One of them says a male friend of hers recently confessed that he was infatuated with her. Afterward, she let him drive her home.... 'Nothing happened, thank God,' she tells her friend...'but it scares me to think of what could have, it scares me to think that I trusted him after I knew how he felt about me.'" For some young women, ritual recitation of alleged abuse (from violent rape to sex after too many beers) at Take Back the Night marches has become a perverse form of self-affirmation. (See "Radical Exhibitionists," July 1992.)

Roiphe acknowledges that the causes of this focus on the dangers of sex are not entirely political; it has to do with the fear of AIDS and with more-general fears of being hurt, of losing control. But more importantly, in today's climate, "there is power to be drawn from declaring one's victimhood and oppression." It is this pursuit of "the coat-tugging authority of the downtrodden" that disturbs Roiphe, not only because of the hypocrisy of the shouting about being suppressed and voiceless ("The first Take Back the Night march at Princeton was more than ten years ago, and every year they're breaking the silence all over again") but because of the self-destructiveness of this kind of empowerment.

The "rape-crisis feminists," Roiphe

says, are reviving stereotypes of lewd men and innocent women, and "promoting the view of women as weak-willed, alabaster bodies whose virtue must be protected from the cunning encroachments of the outside world." The idea that men in our society automatically have more power—the premise behind rules protecting women against unwanted sexual attentions not just from bosses but from equals or even subordinates—devalues women's accomplishments. Feminist victimology threatens to take us back to the old saw that woman's greatest strength is in her weakness.

A FASCINATING CHAPTER IN *THE MORNing After* focuses on legal theorist Catharine MacKinnon (dubbed "the anti-porn star") as the leading exponent of the new "victim" feminism that sees sexual violation as central to the female experience. Those interested in learning more about the woman who gave us our current sexual harassment laws can turn to MacKinnon's own latest opus, the mercifully short *Only Words*.

A blurb from Columbia University's Patricia Williams, hailing MacKinnon as "one of the most visible and effective advocates behind this nation's attention to crimes against women," laments that "because her brilliant writing is largely unread, she has become an ideological easy mark." I'm afraid she's got it wrong: It's only because MacKinnon's work is largely unread that she is considered a legitimate advocate for anything.

"Brilliant" or not, MacKinnon's prose does have a certain hypnotic power. It comes from hyperbolic declarations—"I am asking you to imagine that women's reality is real"—and relentless repetition of claims which are meant to be made flesh by the sheer force of faith. Thus she makes constant references to "snuff pornography," films of actual sexual murders. Evidence that such an industry exists is less than scant: MacKinnon fails to cite a single source. Still, she states that "only for pornography are women killed to make a sex movie," and writes, "suppose the consumer could not get in any other way the feeling he gets from watching a woman actually be murdered. What

Catharine MacKinnon

is more protected, his sensation or her life?" This is an utterly spurious question since, even if "snuff films" exist, they are clearly not protected by law.

Elsewhere, MacKinnon invokes anecdotal and inconclusive evidence: a man who raped and hanged a little Asian girl "had spent much of the day of the murder in an adult bookstore" where he *might* have seen a relatively recent issue of *Penthouse* showing Asian women "trussed and hung." One feels it is quite useless to point out that sexual violence has existed in virtually smut-free societies, or that it is extremely rare in Japan or Scandinavia, despite wide availability of porn.

Insisting that First Amendment rights should be balanced by 14th Amendment guarantees of equality, MacKinnon points to the inconsistency of regulating "discriminatory" speech in the workplace, as sexual harassment laws do, but not in the rest of society. (Some of us who believe that existing harassment laws infringe on speech in unacceptable ways will agree.) Even more central to her case, however, is the argument that pornography is fundamentally different from all other forms of expression.

Pornographic films are not just speech but action, MacKinnon says, because live women are required—usually coerced—to act in them. Would graphic sex in books or animated cartoons, then, be OK? No, because it would still be acted out on live women: "In human society, where no one does not live, the physical response to pornography is nearly a universal conditioned male reaction." (Women, of course, could not *possibly* have such a response.) According to MacKinnon, misogynist ideas permeate society, but pornography is uniquely dangerous because it acts not on the conscious mind but on an irrational process: "The message of these materials...is 'get her,' pointing at all women....This message is addressed directly to the penis, delivered through an erection, and taken out on women in the real world."

This doesn't necessarily mean that the consumer of pornography will rape a woman or a child. It may simply mean that after watching pictures of "a penis ramming into a vagina," he "goes and rams his penis into a woman's vagina" (something that evidently would never occur to him without the pictures). Is the ramming consensual? Is it mutually pleasurable? That doesn't seem to matter.

MacKinnon has been often accused of equating all sex with rape and has invariably denied the charge. But if images of sex acts inevitably degrade and violate women, what of the acts themselves? If the recognition that "inequality between children and adults" makes child pornography criminal should be extended to adult porn because of inequality between men and women, should the law treat heterosexual sex as it treats child molestation?

As portrayed in *Only Words*, men are not innately evil, just made that way by pornography; indeed, MacKinnon shows some sympathy for sex murderers whose claims that smut made them do it were, she feels, unfairly ignored ("we kill a man rather than...stop the pornography that produced him"). But her notion of the evil produced by porn seems to include not just male violence but male sexuality: pornography "gives men erections that support aggression against women." Disapproving references to erections and orgasms pop up, pardon the expression, with alarming regularity. In MacKinnon's vision, the erect penis looms as a malevolent force of almost biblical proportions.

MIMI COTTER

AFTER A TOUR OF MACKINNONLAND, THE actual experiences of a prosecutor confronting the gruesome crime of rape seem like a welcome return to Planet Earth. By a coincidence that must be frustrating to the authors, two such accounts have recently appeared almost simultaneously.

In *Sexual Violence: Our War Against Rape*, Linda Farstein chronicles some of the cases, notorious and obscure, that she has handled in her 15-year career as director of the Sex Crimes Prosecution Unit in the Manhattan District Attorney's Office, as well as recent changes in the legal system. Her low-key yet often engrossing narrative explains the process of collecting evidence in a sex crime and bringing a case to trial.

Farstein's overview of the history of rape prosecutions is a valuable reminder that not so long ago, feminists had very legitimate complaints about the way rape was treated by the courts. As late as 1977, a New York appellate court overturned a rape conviction because the complainant did not show "earnest resistance"—even though the man (with whom she was on a date) had hit her, torn her dress, and pushed her down when she rejected his advances. The ruling sparked such an outcry that the state legislature modified and then dropped the resistance requirement, which existed for no other criminal acts.

As a result, "the law came to reflect that submission to a sexual assault—for survival, to preserve one's life or well-being—is *not* consent to a sexual act." Rules that allowed the victim's sexual behavior to be examined in a trial were also changed to limit such questioning to circumstances directly relevant to consent, such as a prior relationship between accuser and accused.

Yet some jurors may still blame a victim who is seen as having precipitated the attack by, say, being in a bar, or feel that a nice-looking man couldn't possibly be a rapist. (Fairstein adds that "it is often *female* jurors who are most critical of the conduct of other women [and] who are more likely to make judgments based on the physical appearance of the accused.") Unfortunately, in keeping with the mostly upbeat spirit of the book, Fairstein does not describe any cases her office lost. She does give shocking examples of some defense lawyers' sleazy tactics—such as holding up a victim's bikini panties with a leopard-skin print and arguing that only a prostitute would wear such undergarments—but all these are tactics that failed.

The cases Fairstein does profile offer a variety of awful deeds, from stranger attacks in Manhattan office buildings by "Midtown Rapist" Russell West to acquaintance rapes clearly involving force. Fairstein's vivid descriptions of these crimes—a terrified secretary raped at knifepoint on the cold floor of a ladies' room, a dancer running for help half-naked after being violently overpowered by her date—make any comparison to being nagged into unwanted sex almost obscene.

While Fairstein does not address the expanded definition of rape in *Sexual Violence* (she has since spoken favorably of Roiphe's book), she suggests that sexual coercion should not be confused with "the games that members of both sexes play to outwit and trap each other"—a statement many rape-crisis feminists would abhor because it assumes that such games are not only normal but reciprocal. Fairstein also devotes a chapter to the politically incorrect subject of false claims of rape motivated by attention seeking and, yes, revenge. The victims here, she notes, are not only the accused but real rape victims: "Each false accusation makes too many skeptics think that every accusation is a false one—which is a danger that cannot be over-stated."

Linda Fairstein

SARA KRULWICH

SEX CRIMES, BY FORMER PROSECUTOR Alice Vachss, who until late 1991 held essentially the same position in Queens as Fairstein does in Manhattan, bears much resemblance to *Sexual Violence*. Both books include reminiscences of embarking on a legal career and outlines of big and small cases of sexual assault, though Vachss seems to have spent much more time in the courtroom. In literary terms, Vachss is quite simply a better writer; her narrative is more vivid and energetic, the characters more three-dimensional. Her writing is tough and intensely angry.

Not that Vachss is pushing any radical-feminist orthodoxy (in one case, she incurred the wrath of women's advocates by prosecuting an allegedly battered woman as an accomplice with her boyfriend in the fatal beating of her small son). As with Fairstein, the rapes she writes about are clearly acts of violence, not ill-mannered seduction. She is, however, far less satisfied with how the justice system today treats sex-crime victims: "There is a large, more or less hidden population of...collaborators within the criminal justice system"—those who give aid and comfort to rapists.

Often, her anger at the system is well-founded, as when a judge would not find the defendant guilty of rape because the victim, with the perpetrator's jacket over her head, had not actually seen the penetration (the man *was* convicted of crimes carrying the same penalty—only, Vachss says, because of her comments to the media), or when another judge offered a confessed molester of over 80 boys probation and a lecture tour to educate people about pedophilia before public outrage forced him to impose a four-year prison sentence.

What is troubling, however, is that Vachss seems never to have met an acquittal she didn't hate: "Acquittals were

Alice Vachss

always haunting....Mostly they amounted to the jury doing the wrong thing for lousy reasons." Among these haunting cases is one in which she concedes that the accuser, a teenaged baby-sitter who claimed she had been fondled by a customer, had every reason to lie and provided "facts" that didn't check out. To Vachss, when juries acquit because they say they needed more evidence, "what they really mean is that they wanted to see a better victim." (Meanwhile, to question a guilty verdict is "collaboration.")

It's undoubtedly true that in her-word-against-his cases, based wholly on credibility, juries may acquit because they find the accuser unpleasant and therefore unconvincing; at other times, jurors convict because they dislike the defendant. But while Vachss concedes in passing that false accusations of rape do occur, she mostly seems entirely oblivious to such concepts as the presumption of innocence or reasonable doubt.

This is especially puzzling since Vachss started out as a public defender. She mentions getting probation for a bartender who stabbed and seriously injured his boss, on the grounds that the boss had verbally abused and humiliated him for years. Looks like it's not just in sexual-offense cases that victims are put on trial.

Ultimately, neither Vachss nor Fairstein completely resolves the question of how to balance the rights of victims and defendants in cases where the woman says she was forced or threatened into submission, the man offers a plausible story of consensual sex, and the evidence indicates only that there was intercourse. Unfortunately, this serious issue is lost in the rush to redefine seduction as rape, and rape as a political crime—not one individual's offense against another but, as MacKinnon put it in a *New York Times* op-ed, an act by a "member of a group sexually trained to woman-hating aggression."

THE DEBATE ABOUT RAPE AS IT IS CURRENTLY framed is clearly about much more than rape. The irony is that while feminists have argued for a long time that rape is a crime of violence and not of lust, "date rape" has now been turned into a code word for questions about proper norms of sexual conduct. The response to *The Morning After* provides ample evidence of this.

Syndicated columnist Ellen Goodman complains that Roiphe's quip about how "one person's rape may be another person's bad night" implies that women should put up with bad nights. Goodman hails the new rules of sexual conduct as affirming women's own right to pleasure. In an exceptionally vitriolic review of *The Morning After* in *The New Yorker*, Katha Pollitt chides Roiphe for seeing sex as "basically a boys' game, with boys' rules," and praises women's effort to reinvent the game in a nice, tender, non-exploitative image (which sounds very much like the "difference feminism" Pollitt picked apart last year in a witty, lucid article in *The Nation*). In *Commentary*, literary critic Carol Iannone, who likes the anti-P.C. thrust of Roiphe's book, criticizes her for essentially the same thing—expecting women to behave sexually like men—and expresses guarded sympathy for the anti–date rape and anti–sexual harassment movements as "prompted in large part by a quite rational reaction" to the dismantling of traditional standards of chastity.

One might make the modest proposal that the discussion of sexual rules and standards, legitimate though it may be, should be kept entirely separate from the subject of rape. Except that, of course, this would strip the subject of much of its moral urgency. If you tell people that they must ask permission before moving from passionate kissing to touching (and remember to say "please" and "thank you" while they're at it) in order to prevent hurt feelings, many will roll their eyes. But if you tell them it's needed to prevent rape, and actually get them to believe it, it becomes a different matter altogether.

Contributing Editor Cathy Young is a writer in Middletown, New Jersey. She is the author of Gender Wars, *forthcoming from The Free Press.*

Ill-Liberalism

By Steven Hayward

The Anatomy of Antiliberalism, by Stephen Holmes, Cambridge, Mass.: Harvard University Press, 330 pages, $29.95

Political Liberalism, by John Rawls, New York: Columbia University Press, 401 pages, $29.95

LIBERALISM BEARS A HEAVY STIGMA in the popular mind today. It suffices merely to invoke *liberal*—with leaden emphasis on the first syllable—to produce the image of woolly-headed political incompetence embodied in Michael Dukakis or George McGovern. It is significant that the chief po-

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litical aim of Bill Clinton is to avoid being perceived as a "liberal."

This is a great disservice to the grand tradition of liberalism rightly understood (or "classical liberalism"), the tradition of individual liberty, contract, and limited government. What people typically mean today when they use *liberal* derisively is better understood as *statist*. The statist impulse in Western liberal democracies derives from at least two problems. Statism can be seen as the internal degradation of liberalism through egalitarianism; the equal protection of individual rights gives way to the desire to ensure the equal *enjoyment* of rights through expanded state power. Statism can also be seen as the weak, inarticulate, concessionary response of liberal regimes to Marxist-based moralism.

Liberalism in the older sense of the term deserves a defense and rehabilitation. Libertarianism may be said to be the project of defending and rescuing liberalism from its modern statist impulses, and it is arguably the only such project on the scene with any vigor. It is unfortunate, therefore, that Stephen Holmes mars his otherwise helpful *Anatomy of Antiliberalism* with a few stray animadversions on libertarianism. These could be safely overlooked, except that these disparagements (one of which appears on the last page) might suggest to the discerning reader that would-be defenders of liberalism have a blind spot for statism, which paves the way for the projects of radical antiliberals.

It would be mistaken, though, to suggest that Holmes has written an unworthy book. To the contrary, Holmes's book is most useful in sharpening the question: What are we defending liberalism from? While libertarians focus on the visible and advancing edge of ideological statism (much of which derives from the internal corruption of liberalism), Holmes has chosen to focus on an antiliberal strain typically neglected by libertarians. His target is the intellectual antiliberalism that has as its unifying theme what might be called Non-Marxist Pre-Modernism. This kind of antiliberalism is the province of neither the left nor the right, but instead thrives nicely at both extremes. Even though non-Marxist antiliberalism is found at both ends of the spectrum, there are common threads running through both varieties.

Holmes examines six key figures and 10 fallacies of antiliberal thought. His figures are Joseph de Maistre, Carl Schmitt, and Leo Strauss on the right, and Alasdair MacIntyre, Christopher Lasch, and Roberto Unger on the left. Holmes draws a distinction between "hard" antiliberals on the right and "soft" antiliberals on the left.

Statism can be seen as the internal degradation of liberalism through egalitarianism; the equal protection of individual rights gives way to the desire to ensure the equal *enjoyment* of rights through expanded state power.

Hard antiliberals reject liberalism in favor of a higher individualism within some kind of aristocratic regime. Hard antiliberals scorn both equality and the supposed unmanly softness of a peaceful liberal society. Holmes notes the incongruity of this depiction of the inherent weakness of liberal society with the fact of the British Empire's flourishing under liberal parliamentary democracy. (The triumph of liberal democracies in two world wars against theoretically stronger antiliberal regimes can also be adduced as evidence that the antiliberal portrait of the character of liberal society is overdrawn, and the examples of Lincoln and Churchill show that liberal democracies can produce vigorous leadership when necessary.)

Soft antiliberals reject liberalism, though not democracy or equality, in favor of a vaguely defined communitarianism. Their prescription for the best regime

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is less specific than that of the hard antiliberals. Their sentimental attacks on the way liberalism erodes warm and fuzzy community life is usually followed up with a suggestion no bolder than tightening the pornography laws a bit.

HOLMES DOES NOT MINCE WORDS IN discussing his targets, and he finds slightly contemptible the intellectual Manicheanism of antiliberal scholarship. He charges Strauss, for instance, with "bookworm heroism" for suggesting that the "crisis of the West" will be resolved through close readings of ancient texts. MacIntyre, Holmes writes, "uses the Greek polis as a large paddle for spanking modern man." And Lasch's books are summed up as glum mood pieces.

Holmes has chosen serious targets, rather than the easily dismissed reactionary conservatives who disparage Enlightenment rationality *in toto* and seek after "a better guide than reason." Although one may quarrel about whether Holmes has been entirely fair in his spirited treatments of each thinker, he has done a valuable service in taking up a group whose influence (with the exception of de Maistre) is increasing. Holmes's close reading strips away the familiar sound bites from most of these thinkers and reveals glaring defects in their arguments. The soft antiliberals in particular, Holmes persuasively argues, are guilty of schizophrenic self-contradiction, always shrinking back from any serious proposal to overturn liberalism or liberal institutions. "A high-pitched jeremiad fizzles into a tiptoed retreat," he writes.

The most helpful part of the book is the second half, where Holmes dissects and refutes 10 fallacies common to antiliberal thought. Chesterton remarked that heresy is not outright untruth but rather a small part of truth gone mad. Most of the antiliberal fallacies Holmes identifies are aspects of liberal thought driven to an unreasonable extreme. Liberalism, according to these fallacies, is: hostile to "community," responsible for the "atomization" of the individual, indifferent to the public good, and corrosive of authority. It sacrifices the public realm to privacy, places excessive reliance on the anthropology of "economic man," establishes a theory of rights that leads to selfishness, generates moral skepticism, and places excessive reliance on reason.

Most of these fallacies, Holmes argues, arise partly because antiliberals tend to be bad historians of liberal thought, removing liberalism and liberal ideas from their proper context. Hence, each of these fallacies tends to be manifested in Holmes's 10th and most encompassing fallacy, "antonym substitution." This is a form of intellectual bait-and-switch in which antiliberals contrast an old liberal principle with a modern problem or imperative that the principle was not originally proposed in relation to. Property rights, for example, are held up as a badge of selfishness as opposed to the idea of charity, thus wrenching property from its context as a liberal bulwark against destitution and arbitrary power. This acute analysis reveals the brutal truth that even Holmes is too reserved to speak plainly: Much antiliberal criticism is aimed at straw men and is animated by a nostalgia for a moral-spiritual-communitarian society that never was.

A nation that contemplates the communitarian idea of compulsory national service in the absence of some argument from necessity is clearly confused about its liberal principles.

HOLMES RESERVES HIS MOST SUPERB scorn for the communitarians. "Communitarians invest this word [*community*] with redemptive significance," Holmes writes. "When we hear it, all our critical faculties are meant to fall asleep. In the vocabulary of these antiliberals, 'community' is used as an anesthetic, and amnesiac, and aphrodisiac." But Holmes thinks that in addition to being theoretically weak, communitarianism is not politically dangerous—a debatable conclusion. Compulsory national service, to take a leading communitarian idea on the scene today, may not be the leading edge of jackbooted fascism, but any nation that can contemplate such a policy in the absence of some argument from necessity is clearly confused about its liberal principles.

Holmes's critique also leaves little room for acknowledging some of the points about which antiliberals are right (though usually for the wrong reasons). Alasdair MacIntyre is surely right about the disarray of contemporary moral discourse. Holmes makes a short but able defense of liberalism against the charge that it is responsible for the moral skepticism of our time, but the reader is left with the sense that Holmes may doubt the seriousness of the issue beyond the bounds of liberalism's relation to it.

And his relentless scorn for the communitarians also causes him to miss a couple of opportunities. The real enemy of inertial or traditional community structures is not liberalism per se but affluence. And it is far from certain that affluent commercial society experiences fewer genuine expressions of communal life than pre-liberal societies. Social policy, especially welfare and Social Security, has weakened some communal and familial bonds. But it is also probably true that, *compared to pre-liberal society*, there are today far more vital expressions of spontaneous community as well as individual charity. This practical or empirical concern may seem inappropriate for Holmes's intellectual analysis, but it is probably necessary. The vague longing for "community" that expresses itself in various romanticisms is a genuine aspect of human nature that is both politically significant and not susceptible to rational containment alone.

Finally, it ought to be noted that the liberalism and antiliberalism portrayed in this book both seem to overlook that fact that America is not simply a liberal re-

gime; it was also founded to be a *republican* regime. The founding era's liberal republicans thought that self-government depended on the moral character of its citizens and also thought that Enlightenment rationality and liberalism were compatible with republicanism and a moderate concern for individual virtue. Contemporary liberalism has forgotten this, and that is part of the reason for its decay into statism and for the opening on the left to the ahistorical nostrums of "civic republicanism."

To the extent that very modern thought has discarded the classical view of human nature, as Strauss and MacIntyre argue, both liberalism and republicanism are undermined. To suggest that modern liberalism may have a blind spot about this is not to grant license for brigades of communitarian virtuecrats. It should suggest, however, that one of the things most needful for rehabilitating liberalism is a candid reaffirmation of human nature, which is under withering attack from feminism, deconstructionism, and other fashionable ideologies.

Indeed, it is the collapse of the intellectual consensus about the first principles of liberalism—a general consensus that serves as a practical substitute for unanimous consent to the original social contract—under the assault of radical ideology that constitutes the "crisis" of liberalism. John Rawls's *Political Liberalism* aims to develop a least common denominator above which liberalism and liberal institutions may flourish. But *Political Liberalism* turns out to be mostly a restatement of or series of footnotes to Rawls's 1971 blockbuster, *A Theory of Justice*.

Readers of that earlier work will recall Rawls's two principles of justice: First, each person has an equal claim to certain basic rights—an arrangement we would all choose in an "original position" (supposedly equivalent to the "state of nature" of old liberals) behind a "veil of ignorance" that prevents any knowledge of our particular circumstances or interests; and second, inequalities are only just if they benefit the least advantaged members of society. There have been countless critiques of Rawls from all quarters, which need not be rehearsed in the context of his present revisions.

Instead, a good starting point for thinking about this book is the often remarked upon abstraction of Rawls's style and approach. This may not stem purely from his academic orientation. In fact, Rawls's ginger and indirect approach to critical views contrasts sharply with fellow academic Holmes's spirited and at times slashing style. On close reading it appears that Rawls is chiefly concerned with the antiliberalism of the radical left, but he is also worried about giving offense to this vocal segment of our intellectual elites. (In the introduction, Rawls seeks to reassure these potential critics that although this book doesn't cover it, "the alleged difficulties in discussing problems of gender and the family can be overcome.")

This interpretation becomes more plausible when one considers that Rawls's famous second principle rests upon an a priori acceptance of egalitarianism. His tiny rampart against leveling is inadequate to the passions of the day. When removed from abstraction and juxtaposed against the context of current political life, Rawls's project is seen as trying to moderate, accommodate, or appease radical egalitarianism.

Rawls means to be a friend of liberalism against the extremes of antiliberal thought, but the hard left is not likely to accept his appeasement. The aim of defending and reviving liberalism is better sustained through a book such as Thomas Pangle's *The Ennobling of Democracy: The Challenge of the Post-Modern Age*, which directly confronts radical ideology and seeks to make classical liberalism and republicanism into viable modern alternatives. (Likewise, a nice companion volume to Holmes is Paul Rahe's massive *Republics Ancient and Modern*, which, while situating America as a liberal republican regime midway between ancient and modern, makes the case that the ancient "communities" that some antiliberals pine for weren't so hotsy-totsy after all.)

The end of the Cold War, Holmes points out, has not necessarily left the world in the hands of liberals, Francis Fukuyama notwithstanding. Ideological antiliberalism of the kind Holmes tracks is important to recognize, but much more immediately troubling is the kind of weak Rawlsian liberalism that plays into the hands of statists and antiliberals alike. To paraphrase the old cliché, with liberals like that, who needs antiliberals? ®

Contributing Editor Steven Hayward is research and editorial director for the Pacific Research Institute.

Illicit Pleasures

By Brian Doherty

Ain't Nobody's Business If You Do: The Absurdity of Consensual Crimes in a Free Society, by Peter McWilliams, Los Angeles: Prelude Press, 815 pages, $22.95

PETER MCWILLIAMS HAS MADE HIS name and fortune writing best-selling pop-psychology tomes with titles like *DO IT!* and *LIFE 101*. As these titles indicate, he is a rhetorician who deals in advice bestowed with bold strokes and emphatic insistence. It would take such a man to devote 815 pages to a book that, by his own admission, has just "one idea" behind it: "You should be allowed to do whatever you want with your own person and property, as long as you don't physically harm the person or property of another."

McWilliams's self-help best sellers preach a message of personal responsibility, which is a refreshing switch from the miasma of tomes hyping inner children and codependency. In a world where so many people are falling over themselves to assure us that nothing is our fault, McWilliams earns respect for telling us that we are responsible for what we do—and that it's nobody's business but ours, unless we are directly and physically harming others.

I hope McWilliams's "one idea" will be intuitively attractive to his readers, because if it isn't this book may not convince. At best, it may engender the grudging consent of someone weary from an hours-long browbeating. At 815 pages (the impact is softened by the large epigrams laid out on every page), this book is far too long. While McWilliams's style and approach are breezy—often too breezy by half (he's not nearly as funny as he thinks he is)—this rambling and repetitive volume stinks of a secular Inquisition. Especially after one realizes that the target repeatedly trotted out in McWilliams's shooting gallery is that weary liberal bogeyman, right-wing religious fundamentalism, as personified by Pat Robertson and Jerry Falwell.

In service of the attack on the Revs. Robertson and Falwell and all they represent, ensconced uncomfortably in the center of this overly long book is *another* overly long book. Part IV, "Consensual Crimes and the Bible," is 190 pages intended to debunk contemporary Christian support for laws against drug use, prostitution, gambling, homosexuality, adultery, suicide, and other acts usually called "victimless crimes." McWilliams calls them "consensual crimes," since everyone involved in them is so by free choice. (McWilliams chooses this sensible new locution to avoid the sophistry over the alleged "victims" of victimless crimes, such as the upset relatives or those who can no longer count on the continued support of the indulger.)

McWilliams's argument suffers from his insistence that a misunderstanding of biblical teaching lies at the root of our culture's animosity toward consensual criminals. He states this explicitly in the introduction and depends on it implicitly to bear the weight of his arguments by devoting hundreds of pages to proving that Jesus didn't really condemn drug use, adultery, homosexuality, and gambling, and was in fact a rather pacific and forgiving fellow.

McWilliams's self-help best sellers preach personal responsibility, a refreshing switch from the miasma of tomes hyping inner children and codependency. In a world where people are falling over themselves to assure us that nothing is our fault, McWilliams earns respect for telling us that we are responsible for what we do—and that it's nobody's business but ours, unless we are directly and physically harming others.

McWilliams spends dozens of pages reciting picayune Levitical and Pauline regulations to make the irrelevant point that modern religious right-wingers don't ask for the state's strong hand to clamp down on, say, those who don't cancel all debts after seven years (see Deuteronomy 15:1) or who boast (James 4:16). A moment of reflection could tell anyone McWilliams is barking up the wrong tree. Surely we all know plenty of atheists and nonpracticing *soi-disant* "Christians" who don't believe in legalizing drug use or prostitution. McWilliams himself makes it painfully obvious after about 10 pages of this litany that it's not really religion that motivates intolerance of consensual crimes; we don't condemn as a society everything God condemns as a deity.

McWILLIAMS NONETHELESS CONTINues to insist that it *is* religion, but dumb Christians befuddled by Robertson and Falwell just don't *understand* their religion. And if they could be made to understand it *his* way, their objection to legalization of consensual crime would cease. This emphasis on religion is fundamentally mistaken, wastes hundreds of pages, and leads McWilliams to make silly arguments, such as claiming that all laws against consensual crimes violate the First Amendment because they are really establishments of religion.

McWilliams is wrong on other issues as well. While the sections on Christianity are irrelevant, they are at least mostly sound in their biblical analysis and are entertaining and educational for someone interested in Christianity. Other chapters have less redeeming value. McWilliams's greatest failing as a scholar—which admittedly he doesn't claim to be, but which a book of this scope requires—is that he seems to believe almost anything he hears or reads, as long as it's not from Robertson or Falwell.

The worst chapter is "Putting the Problem in Perspective," in which McWilliams discusses all the uses to which "we" should be putting the estimated $50 billion a year we spend enforcing laws against consensual crimes. Among the problems he'd like to address are the usual panoply of bogus environmental ills (overpopulation, ozone holes, global warming, landfill overflow); weird *Oprah Winfrey* bugaboos like 400,000 children abducted a year, many for the purposes of rape, murder, and torture; the rampant spread of heterosexual AIDS; and so on. The two most interesting "facts" that McWilliams uncritically parrots in this book are that secondhand cigarette smoke is "far more cancerous than even primary cigarette smoke" and that "each time the space shuttle goes up, .25 percent of the ozone layer is destroyed."

THIS CREDULOUSNESS, TOGETHER WITH the book's lack of footnotes, will lead the alert and unsympathetic reader to question the many unsourced figures that McWilliams offers in his attempt to estimate the practical costs of the war on consensual crimes. This is a shame, because hidden among all the bad one-liners and biblical exegesis is a solid and comprehensive book on the injustice and impracticality of laws against consensual crime. McWilliams's heart is definitely in the right place. Any reader will feel the passion that drives him as he calls for a halt to the injustice of imprisoning, stealing from, and destroying the lives of hundreds of thousands of individuals who have caused no harm to anyone but themselves.

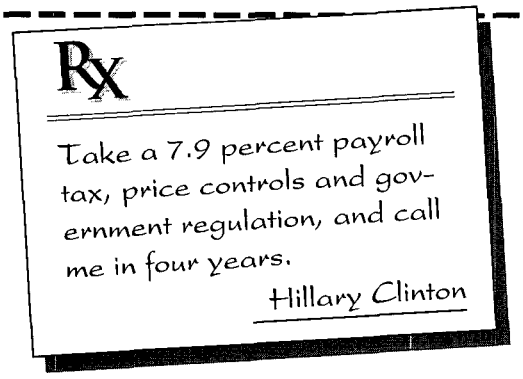
All the good arguments against the criminalization of consensual acts are here, somewhere: how these crusades prop up and empower organized crime; eat away at our constitutional rights to property and freedom from search and seizure; come nowhere close to achieving their aims; corrupt legitimate law enforcement; promote irresponsibility; and in general are merely sops to ignorance, fear, hatred, and envy. No other book out there pulls together all these arguments in the depth and detail that McWilliams offers.

But there is no principle behind his evidence, history, and arguments powerful enough to dissuade those who simply feel that indulging in consensual crimes is *wrong*. And Christianity, which he wastes so much space tilting at, is not the sole source of this feeling.

The one principle that might be powerful enough to overcome such opposition—a commitment to government that is limited to protecting our rights to liberty and property from abuse by others—is explicitly rejected by McWilliams. "I'm not going to argue the pros and cons of private ownership, free enterprise, capitalism, and the free market system," he writes. "What is indisputably true is that this *is the economic system we have*." Since we allegedly have this system, and since laws against consensual acts generally involve violations of property rights and free markets, we should reject such laws.

Unfortunately, we don't have this system yet; it still needs to be defended, persuasively, to the mass audience that has made McWilliams's self-help books best sellers. Maybe that could be his next 800-page tome. With *Ain't Nobody's Business*, McWilliams proves he has in him a snappy and informative 200-to-300-page book on the fiscal, moral, and constitutional horrors of laws against consensual crime. Too bad he wrote this one instead.

Brian Doherty is the assistant editor of Regulation *magazine.*



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Freshman Year

By Thomas W. Hazlett

Clinton's dizzying debut.

THE MOST AMAZING YEAR OF LIVING politically dangerously has just rolled by, and those bratty, rich kids in the Clinton gang have taken the Administration Building by storm. These bright youngsters have proven that all it takes to succeed in America is a little pluck, good SATs, and a super-collider's worth of spin.

Traipsing through its first months like a drunk in denial, unable to nominate an attorney general who was a) female and b) legal; mired in that gripping social issue rocking millions of American families—gays in the military; and backtracking on promises about Bosnia, China, and Haiti faster than you can say, "George Bush is a buffoon—we can do better," the Clintonites were in Gallup Poll free fall until they hired a Republican policy masseur. David Gergen did massage their message gently, and a more relaxed, self-confident White House managed to produce not just sound bites and screw-ups but actual Policies.

Policies that just *feel* right. Maybe the rough edges rub, or the columns don't quite add up. What do you expect after so many years of Republican neglect? Stephie's glib rejoinders were largely swallowed whole by groupies in the press. When inquiring minds began reading stories asking if the media were being too hard on the president, you knew the White House had some dedicated disciples. If Clinton were to disguise his new tax policy with the excuse, "Oh, on the campaign trail I said I wouldn't *raze*—R-A-Z-E—your taxes," *The Washington Post* would do a feature on how difficult communication is in a language as complex and confusing as American English—particularly after 12 years of linguistic-studies cutbacks under Reagan-Bush.

The Clinton-Gore team believes its ideas are fresh and herald change. As Thomas Sowell has noted, everything looks brand-new to those who don't know any history. While the administration twirled itself dizzy selling its $496-billion deficit-reduction plan, the Bush budget compromise legislation of 1990, which "slashed" the deficit by $492 billion (also over five years), and which was larger in real terms, is simply a wisp in the winds of time. Under Clinton, the largest federal agency has become the Department of Revisionism, and its output is truly prolific. Reinventing government? More than you think, they already have. Let us count two ways.

THE ETHICS THING. WHAT'S THE SECRETARY of commerce doing, meeting with Vietnamese lobbyists in private condos and then lying about it? If nothing happened, why lie? And forget about Hillary wearing the pants—what about her *shorts*? When she's caught speculating in health-care stocks, the White House dodges by claiming that she's not really a government employee. (Whatever happened to the "appearance of impropriety"?) Alas, this classic conflict-of-interest story goes nowhere. Indeed, we are treated to fawning coverage of the (meaningless) campaign finance reform vehicle which the administration will ride to the Clean Politics Ball. (It's a masquerade.)

I may not be a free-trader, but I play one on TV. Most astoundingly, Clinton has now positioned himself as a courageous and principled champion of free markets. If only it were so. But the evidence is overwhelming in act, deed, appointments, and policy that Clinton hasn't the slightest faith in the invisible hand of commerce. He latched onto NAFTA only to increase his opportunities for international sport. (Like getting into some Japanese prime minister's face over Rice-a-Roni, the Nippon basher's treat.) The administration came to power denouncing the loss of American jobs via unregulated market forces and scaring the populace about the insecurity of economic competition. When Al Gore told Ross Perot in their CNN debate that "fear and despair will take you only so far," a sharper opponent might well have responded, "Well, it seems to have gotten you and your boss into the White House."

Where Clinton promptly appointed Laura D'Andrea Tyson as his chief economist. Dr. Tyson's new tome on trade policy, released in 1993, is a primer on how and when to disrupt free-trade flows with targeted subsidies, "aggressive unilateralism" (intimidating trading partners with tariff threats), and "managed trade" (outright protectionism).

The great international-trade economist Jagdish Bhagwati described the book's key contribution this way: "Tyson would overturn the basic premises of our postwar trading policies....Her positions also dovetail nicely with the inclination to interventionism that attends declinism." If Ross, a declinist deluxe, read books without cartoon illustrations, he might have gained some debating points by quoting Tyson to Gore. In the event, the administration's true colors on trade were washed away in a grand moment of enlightened globalism, and the president was allowed to stand on a stage that White House termites had sought to dismantle.

1994's going to be a helluva year. I'm going to pull up a chair and watch, although I think I'll megadose some Dramamine to ready myself for the spin cycle. It's fascinating to watch history in the remaking. ®

Contributing Editor Thomas W. Hazlett teaches economics and public policy at the University of California, Davis.

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INSIDE AMERICAN EDUCATION

"The American system of education is bankrupt," charges Thomas Sowell, pointing out that even those who know this are helpless to reform it. "We need to face the harsh reality of the kind of people we are dealing with, the kind of bitter fight we can expect if we try to disturb their turf." Dr. Sowell piles up proof with example after example. Among the hundreds:

> Just how incompetent a teacher can be and still keep the job was illustrated by an extreme case in South Carolina, where a school tried to get rid of a teacher who had been warned repeatedly about her poor teaching and poor English. At a hearing where she was given a ten-word vocabulary test, she could neither pronounce nor define the word "agrarian." She could pronounce the word "suffrage" but defined it as "people suffering from some reason or other." The word "ratify" she defined as "to get rid of something." In her own defense, she said: "I'm not saying I was the best, but I don't think I did more harm than anyone else." A judge ordered her reinstated.

Walter Williams, himself a distinguished professor of economics, sums up Dr. Sowell's achievement in the *Washington Times*:

> "We all know about the poor and deteriorating state of education in America, but we don't know all the reasons why. *Inside American Education* gives us the fullest list of particulars that I have seen ... names, dates and places on how the education establishment from kindergarten to college is destroying our children's prospects for the future, all the while taking taxpayers, parents and private foundations to the cleaners."

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